

M. YUSUF M. BALUCH

QUESTIONS & ANSWERS

PAKISTAN PENAL CODE

★ PRINCIPLES OF CRIMINAL LAW

★ HUDDOD LAWS



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Questions & Answers
Chapter-wise Series

PAKISTAN PENAL CODE

(XLV OF 1860)

with

Hudood Laws
Principles of Criminal Law

By

MOHAMMAD MUZAMMIL
Advocate

Mansoor

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House- Katchery Road, Lahore

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PAKISTAN PENAL CODE

(XLV OF 1860)

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PAKISTAN PENAL CODE (XLV OF 1860)

CHAPTER I

INTRODUCTION

(Sections 1--5)

Q. 1. Who are the persons liable to be punished under the Pakistan Penal Code? Point out statutory and other exceptions, if any.

Ans. PERSONS LIABLE FOR CRIMINAL ACT: Section 2 of the Pakistan Penal Code provides that every person shall be made liable to punishment under the Code, without distinction of nation, rank, caste or creed, provided the offence with which he has been charged has been committed in some part of Pakistan. A foreigner who enters the Pakistan territories also submits himself to the operation of Pakistani Laws and he cannot be allowed to plead in defence that he did not know that he was doing wrong, as the act was not an offence in his own country.

STATUTORY EXCEPTION: Although the Pakistan Penal Code does not provide any exception in favour of any person from the jurisdiction of Criminal Courts, such a statutory exemption is available under Art. 248 (2) (3) of the Constitution. It provides that no criminal proceeding whatever shall be instituted or continued against the President or the Governor of a Province, nor shall a process for his arrest or imprisonment issue in or from any Court during his term of office.

DOCTRINE OF EXTERRITORIALITY: Besides the above statutory exception the doctrine of exterritoriality exempts the following persons from the jurisdiction of the Criminal Courts of every country :

- (1) **SOVEREIGNS WHILST TRAVELLING OR RESIDENT IN FOREIGN COUNTRIES:** This privilege is extended to sovereigns even when they are living *in cognito*;
- (2) **FOREIGN STATE:** A Foreign State cannot be made a party to a proceeding in another State;
- (3) **AMBASSADORS AND OTHER DIPLOMATIC AGENTS:** They and their family enjoy complete immunity from criminal jurisdiction of the Courts of the country to which they are accredited;

- (4) **PUBLIC VESSELS WHILST IN FOREIGN PORTS OR TERRITORIAL WATERS:** They are exempt in foreign waters from the jurisdiction of the State within whose territorial jurisdiction they happen to be;
- (5) **THE ARMED FORCES OF A STATE WHEN PASSING THROUGH A FOREIGN TERRITORY:** They are exempted from the jurisdiction of a foreign State, when, by consent, they happen to pass from its soil;
- (6) **ALIEN ENEMIES :** In respect of acts of war they cannot be tried by Criminal Courts but can only be dealt with by martial law. In respect of offences unconnected with war, they are triable by ordinary Criminal Courts; and
- (7) **INTERNATIONAL INSTITUTIONS :** These institutions, *e.g.*, the United Nations and its various branches have been conceded immunity from territorial jurisdiction.

Q. 2. (1) What is the jurisdiction of the Courts in Pakistan to try a Pakistani citizen for an offence committed beyond Pakistan or a foreigner in respect of an offence committed within the territory of Pakistan ?

(2) A, a citizen of Pakistan, commits a murder in Uganda. Can he be tried and convicted of murder in any place in Pakistan ?

(3) A, a citizen of Pakistan, commits an act of adultery in England, which is not an offence in that country. Can he be prosecuted in Pakistan ?

Ans. (1) JURISDICTION OF COURTS : Sections 3 and 4 of the Pakistan Penal Code provide that an act constituting an offence in Pakistan shall also be an offence when committed by a Pakistani outside Pakistan and that Local Courts can take cognizance of it when committed by a citizen of Pakistan beyond the territories of Pakistan. Section 4 further provides that the provisions of the Code also apply to any person on any ship or aircraft registered in Pakistan wherever it may be. Admiralty jurisdiction, *i.e.*, the jurisdiction to try offences committed on the high seas, extends over offences committed on Pakistani ships on the high seas, extends over offences on foreign ship in Pakistan territorial waters and pirates.

With regard to the liability of a foreigner for an offence committed within the territories of Pakistan he is liable to be

punished under the Pakistani Law for as soon as he enters the Pakistan territories he accepts the protection of Pakistani Laws and virtually gives an assurance of his fidelity and obedience to them.

(2) TRIAL IN PAKISTAN : A can be tried and convicted of murder in any place in Pakistan where he may be found as Section 4 clearly says that the provisions of the Code apply to any offence committed by any citizen of Pakistan in any place without and beyond Pakistan.

(3) PUNISHABLE IN PAKISTAN : A is punishable for an offence under Section 497 of the Pakistan Penal Code in spite of the fact that the act was committed in England, where it is not an offence for he is to be governed by Pakistani Laws and is as such amenable to the jurisdiction of Pakistani Courts.

Q. 3. Can private individuals inflict punishment on supposed offenders?

Ans. INDIVIDUAL PUNISHMENT ON SUPPOSED OFFENDERS : A number of people proceeded to punish a man and a woman supposed to be keeping a brothel and otherwise leading an immoral life, by blackening their faces and parading them in a procession in streets with their hands tied, the man being completely stripped of clothing and the woman deprived of her *dopatta*. It was *held that* : Under no law much less the Islamic Law a person has got a right to inflict punishment on a person supposed to have committed any offence of moral wrong. Even if they were leading an immoral life, nobody had a right to inflict any punishment on them much less the punishment of stripping them of their clothes and blackening their face. Under the law of the land as well as under the Islamic Law general disrepute would not entitle anybody to punish the persons complained against. That those who took the law into their own hands were led to do so by the instigation of religious leaders was no reason for dealing leniently with them. The offence warranted deterrent punishment.

Where some people who were definitely more than five in number, formed an unlawful assembly, the common object of which was to commit mischief or criminal trespass, or other offence by entering into hotels and restaurants after arming themselves with sticks and thus having made preparation for causing hurt to the persons who were not observing fact and where the defence pleaded Hadees in justification of the accused's action. It was *held that* : The conviction of the accused under Section 452 of the Pakistan Penal Code was well founded. Nowhere in the Holy Qur'an has anybody been permitted to take law into his own hands and start first judging a person whether he has done a certain wrong or not, and then inflicting the sentence at once. No one in Islamic society has got a

right to take the law into his own hands, because if everybody is permitted to become himself the judge and then inflict the sentence at the spot, there would be chaos in society.

Q. 4. Is master liable for acts of his servants ?

Ans. MASTER LIABLE FOR HIS SERVANT : Section 1 says every person will be guilty under this section for an act or omission contrary to the provisions of the Code. If a servant alone commits an offence his master may also be guilty under the provisions relating to abetment, or under certain other sections of the Code which impose liability on the master even though he may be entirely ignorant of his acts, e.g., Section 154. But the question very often arises whether a master is liable for criminal acts of his servant done without his knowledge but in the course of his employment. So far as civil liability goes it is a recognized principle that a master is liable for all tortious acts of his servant done in the course of his employment. A master, however, is not primarily responsible for the unauthorized acts of his servant. He is only criminally punishable, who immediately does the act, or permits it to be done.

A master is liable for the criminal act of his servant, where a statute under which he is charged prohibits that act or enforces a duty in such words as to make the prohibition or the duty absolute.

Q. 5. What is meant by the term "Extradition" ?

Ans. EXTRADITION : Extradition means the surrender of a fugitive offender by one State to another in which the offender is liable to be punished or has been convicted. The law of extradition is founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice.

Q. 6. Can foreigners in Pakistan be punished for offences committed outside Pakistan ?

Ans. PUNISHMENT FOR OFFENCES COMMITTED OUTSIDE PAKISTAN : There is no express enactment by which the Pakistan Legislature can assume to render foreigners subject to the criminal law with reference to acts committed by them beyond the limits of Pakistan. In the words of Chief Justice Cockburn, "proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such

limits:-- The rule must, however, be taken subject to this qualification, namely, that if the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent, on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of International Law with the Governments of other nations." The acts of a foreigner committed by him in the territory beyond the limits of Pakistan do not, therefore constitute an offence against the Penal Code, and, consequently, a foreigner cannot be held criminally responsible under that Code by the tribunals of this country for acts committed by him beyond its territorial limits. It is only for acts done when the person doing them is within the territory over which the authority of the Pakistan Law extends, that the subjects of a foreign State owe obedience to that law and can be made amenable to its jurisdiction. Thus when it is sought to punish a person, who is not a Pakistani subject, as an offender in respect of a certain act, the question is not 'where was the act, committed,' but 'was the person at the time, when the act was done, within the territory of Pakistan'. For if he was not, the act is not an offence, the doer of it is not liable to be punished as an offender, and he is, therefore, not subject to the jurisdiction of Criminal Courts. A foreign subject resident in a foreign territory, instigating the commission of an offence which, in consequence, is committed in Pakistan territory, is not amenable to the jurisdiction of a Pakistani Court if the instigation has not taken place in Pakistan.

CHAPTER II

GENERAL EXPLANATIONS

(Sections 6--52-A)

Q. 7. Define the terms "Judge", "Court of Justice" and "Person" as used in the Pakistan Penal Code.

Ans. 'JUDGE': The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment. (S. 19)

The above definition shows that not only every person designated as a Judge is a Judge, i.e., High Court Judge, District Judge, Sessions Judge or Civil Judge but also those persons who fall under the above category. Thus a Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal is a Judge. But a Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court is not a Judge.

'COURT OF JUSTICE': The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially. When the Judges are transacting merely administrative business, they are not a Court of Justice. (S. 20)

'PERSON': The word "person" includes any Company or Association, or body of persons, whether incorporated or not. It, therefore, includes not only a natural person, i.e., a human being--a man, woman or child--but also an artificial person, i.e., corporation or a judicial person like an idol. (S. 11).

Q. 8. Define and distinguish "Servants of State" and "Public servant"?

Ans. "SERVANT OF STATE": Words "servant of the State" denote all officers or servants continued, appointed or employed in Pakistan, by or under the authority of the Federal Government or any Provincial Government.

"PUBLIC SERVANT": The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely :--

First : Omitted:

Second : Every Commissioned Officer in the Military, Naval or Air Forces of Pakistan while serving under the Federal Government or any Provincial Government ;

Third : Every Judge.

Fourth : Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or the interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties ;

Fifth : Every Juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant ;

Sixth : Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh : Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth : Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

Ninth : Every officer whose duty it is, as such officer, to take, receive, keep or expand any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report, or any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty ;

Tenth : Every officer whose duty it is, as such officer, to take, receive, keep or expand any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make any authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district ;

Eleventh : Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Illustration : A Municipal Commissioner is a public servant.

Explanation 1 : Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2 : Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3 : The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, or whatever character, the method of selection to which is by, or under, any law prescribed as by election.

Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs those duties, and accepts those responsibilities and is recognized as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that notwithstanding his performance of public duties and the recognition by others of such performances, he is not a "public servant".

The general test to determine whether a person is an officer within the meaning of Section 21 (9). Penal Code is to see whether he is in the service of pay of the Government and whether he is entrusted with performance of any duty.

DISTINCTION BETWEEN GOVERNMENT SERVANT AND PUBLIC SERVANT : From the above it is clear that all public servants are not Government servants. The term "public servant" is the genus of which Government servant is its species. A public servant need not be in the pay of the Government but a Government servant is necessarily in its pay. On this analogy a juryman, an assessor or a Municipal Commissioner is a public servant but not a Government servant for he is not paid by the Government.

HELD TO BE PUBLIC SERVANT : The following have been held to be 'public servants' within the meaning of this section :-

- (1) Peons in Government offices.
- (2) Cotton Inspector.
- (3) Employee of Social Welfare Council.
- (4) Head treasurer appointed by contracting treasurer.
- (5) Jailor and convict warder.

- (6) village watchman.
- (7) Railway employees.
- (8) Sub-Inspector of Police belonging to the Finger-Print Bureau.
- (9) Chief Minister of Province and a Minister.
- (10) Officers of Local Boards, Municipalities, District Boards, Sanitary Boards or other such Local Boards.
- (11) A Liquidator appointed by the Registrar, Co-operative Societies and a collecting agent appointed by such Liquidator.
- (12) Nikah Registrar under the Muslim Family Laws Ordinance.
- (13) A treasurer who is an employee of the Municipal Committee and receiver income of the Municipal Committee is obviously a public servant.
- (14) WAPDA employees performing functions in connection with the affairs of province.
- (15) Accountant of Agricultural Development Bank.
- (16) Driver of Karachi Transport Corporation.
- (17) Manager Co-operative Bank and Co-operative Society for purposes of Section 21; and
- (18) Auction Contractor appointed on commission.

NOT PUBLIC SERVANTS : The following persons are held to be not public servants :

- (1) Secretary of Control Co-operative Bank is not a public servant ;
- (2) Irregular appointment does not affect the status of public servant ;
- (3) A public servant who has retired from office or has otherwise ceased to be so is not a public servant ;
- (4) Union Board member is not a public servant ;
- (5) Chowkldar of Government godown is not a public servant.
- (6) Servants employed by Agricultural Development and Supplies Corporation could hardly be regarded as employees of Provincial Government or public servants within the meaning of Section 21 of the Penal Code ;
- (7) Managing Director of a Public Limited Company is not a public servant.

Q. 9. Explain the terms "Wrongful Gain" and "Wrongful Loss"?

Ans. WRONGFUL GAIN: Wrongful-gain is gain by unlawful means of property to which the person gaining is not legally entitled.

WRONGFUL LOSS: Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.

For either wrongful gain or loss, the property must be lost to the owner or the owner must be wrongfully kept out of it. Where the owner is kept out of possession of his property with a view to depriving him of the benefit arising from the possession, even though temporarily, it will be a case falling within the above definition of wrongful loss or wrongful gain. Thus where a creditor compels his debtor to discharge his debt by taking the goods of his debtor out of his possession against his will, the former will be guilty of theft by causing wrongful loss to the debtor. If, however, the object is only to cause mental anxiety to the owner by keeping him out of possession only temporarily and in jest or with a view to teaching him a lesson to be more careful and then restoring the thing to him without demanding and recompense or reward, the case will not amount to causing wrongful loss.

GAINING WRONGFULLY; LOSING
WRONGFULLY: A person is said to gain wrongfully when such person retains the property wrongfully, as well as when he acquires it wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when he is wrongfully deprived of property. (S. 23)

Q. 10. State under what circumstances a person can be said to act dishonestly and fraudulently. In this connection also distinguish between the terms "Dishonestly" and "Fraudulently" ?

Ans. DISHONESTLY: Section 24 of the Pakistan Penal Code lays down that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

The terms "wrongful gain" and "wrongful loss" have already been defined in answer to the previous question.

In order that an act may be termed as "dishonest" in its legal sense it is essential that there must be wrongful gain to one person or wrongful loss to another. The definition of the term "dishonestly" refers to wrongful gain or wrongful loss, but it is not necessary that wrongful gain or wrongful loss should be actually caused, and an intention to cause it is sufficient. In offences involving dishonesty

intention must be proved beyond doubt. Thus where a person used another person's money contrary to the purpose for which it was given, the intention is *prima facie* dishonest.

FRAUDULENTLY : Section 25 of the Pakistan Penal Code provides that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

The terms "fraud" and "defraud" have not been defined in the Pakistan Penal Code. According to Sir James Stephen, whenever the word "fraud" or "intent to defraud" or "fraudulently" occur in the definition of a crime two elements at least are essential to the commission of the crime, *viz.*, (a) deceit or an intention to deceive or in some cases mere secrecy; and (b) either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.

'Defrauding' thus involves two conceptions, *viz.*, deceit and injury (*i.e.*, infringement of some legal right) to the person deceived, though the infringement may not necessarily involve deprivation of property. Sir James Stephen has laid down that where there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud.

e.g. The issue of a false statutory report of a company with a view to inducing people to invest their money is a fraudulent act. So is also the case where a person uses a false certificate with the intention of being permitted at an examination where he could not have appeared but for such certificate.

DISTINCTION BETWEEN "DISHONESTLY" AND "FRAUDULENTLY" : [A person is said to act dishonestly when he does a thing with the intention of causing wrongful gain to one person or wrongful loss to another; he acts fraudulently if he does that thing with intent to defraud. Therefore if the intention by the deceit practised is to cause wrongful loss it is dishonesty; but even in the absence of such an intention if the deceitful act wilfully exposes any one to risk of loss there is fraud. Again, a fraudulent act may not necessarily be dishonest, though it is generally so. Thus the production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced may not be dishonest within the meaning of Section 24 of the Pakistan Penal Code, yet it is fraudulent within the meaning of Section 471 of that Code.]

Q. 11. (1) Define "Counterfeiting". (2) What offence, if any, has been committed by X if he has in his possession implements for making a Pakistani coin ?

Ans. (1) COUNTERFEITING : A person is said to 'counterfeit' who ;

(i) causes one thing to resemble another thing,

- (ii) intending by means of that resemblance to practise deception, or
- (iii) knowing it to be likely that deception will thereby be practised.

Explanations : (1) It is not essential to counterfeiting that the imitation should be exact. (2) When a person cause one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised. (S. 28)

(2) No offence has been committed by X because mere possession of implements capable of counterfeiting coins is not an offence within the meaning of Section 235, P.P.C. Possession of such implements must be with the intention of counterfeiting coins and unless the intention is proved there is no offence.

Q. 12. Define and distinguish:

(1) Document, and (2) Valuable security.

Ans. (1) DOCUMENT : The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter. (S. 29).

Explanation 1 : It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice or not.

Explanation 2 : Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration : A writing, expressing the terms of a contract, which may be used as evidence of the contract, a cheque upon a banker, a power-of-attorney, a map or plan capable of being used as evidence and a writing containing directions or instructions are all documents.

(2) VALUABLE SECURITY : The words "valuable security" denote a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration : A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security". (S. 30)

DISTINCTION : Document is the genus of which valuable security is a species. Thus a valuable security is always a document, but not *vice versa*. It is only those documents which create, extend, transfer, restrict, extinguish or release any legal right which are termed as "valuable securities".

Q. 13. What are the ingredients of Section 34 of the Pakistan Penal Code which lays down joint responsibility in the doing of a criminal act ? What is the principle governing this section ?

Ans. **ACTS DONE BY SEVERAL PERSONS IN FURTHERANCE OF COMMON INTENTION** : Sec. 34 of the Pakistan Penal Code lays down that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The essential ingredients to be proved in order to fix joint responsibility are : (a) that a criminal act was done ; (b) that the said act was done by several persons; and (c) that several persons did it in furtherance of the common intention of all, i.e., there was a pre-arranged plan in pursuance of which the criminal act was done and the act of each accused helped to further the common intention.

The word "act" referred to in this section includes a series of acts done by several persons, some perhaps by one of those persons and some by another, but all in furtherance of common intention.

In order to attract the provisions of the section it is not enough that there was the same intention on the part of several people to commit a particular criminal act or a similar intention, but it is necessary to prove that there was a pre-arranged plan pursuant to which the criminal act was done in concert. To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and be shared. The pre-arranged plan may be made shortly or immediately before the commission of the crime and a long-standing conspiracy is not required for the applicability of this section. The common intention may also develop in the course of events, though it might not have been present to start with.

When the above essentials are satisfied each of such persons would be liable for the entire criminal act in the same manner as if he alone had done it irrespective of the fact whether he was present at the time or not. A furtherance of a common design is a condition

precedent for convicting each of the persons who take part in the commission of a crime and, if what the several accused did are clearly individual acts done of their own accord rather than acts done in furtherance of a pre-arranged or pre-conceived plan or arrangement between them, the liability of each accused can be in respect of his own individual act and not the joint liability contemplated in Section 34 of the Code. It has been held that the fact that the accused kept standing in the room in which a brutal murder was being committed is not sufficient to convict them of the murder. Failure to rescue the victim does not render them liable, unless community of design is proved. It has further been held in another case that where the common intention was to commit theft and one of the thieves commits murder, everyone of his companions is not liable. However, if one of them openly carried a gun with him all of them must be deemed to have intended the murder.

Section 34 of the Pakistan Penal Code does not create an offence. It is not a penal provision. It simply lays down a principle of criminal liability or constructive criminality under which all are held liable for the acts of one of them. It does not lay down any general formula or prescribe a standard to suit a combination of all possible circumstances in relation to a criminal act. The principle underlying the section is that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. It is a well-recognised and established canon of criminal jurisprudence that if parties go with a common purposes to execute a common object, each and everyone becomes responsible for the acts of each and every other in execution and furtherance of their common purpose: as the purpose is common, so must be the responsibility. All are guilty of the principle offence, not of abetment.

Q. 14. Define Common intention and Common object?

Ans. COMMON INTENTION: Section 34 of the Penal Code deals with constructive criminality, *i.e.*, liability of all for acts done by one or more. This section was introduced in order to meet cases in which it may be difficult to apportion the liability of each member according to his participation in the commission of the crime. Since it is difficult to distinguish precisely the part taken by each member of a group, it was thought necessary to declare all the persons equally liable for the acts done. Section 34 does not create a distinct offence, it only lays down the principle of joint criminal liability. So it is a rule of evidence only and does not create a substantive offence.

The words "furtherance of common intention" have been the subject of much discussion amongst the lawyers and conflicting interpretations have been put forth. One common agreed point has, however, been that furtherance of a commonly design is the

condition precedent for joint liability under Section 34. The words common intention means unity of purpose or a pre-arranged plan. The following are the ingredients of Section 34:-- (1) Two or more persons. (2) They must have a common intention to commit an offence. (3) Participation by all the accused in doing act or acts in furtherance of that common intention.

COMMON OBJECT: Section 149, like Section 34, is the other instance of constructive joint liability. Section 149 creates a specific offence. It runs as under :-

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

The essence of offence under Section 149 is assembly of several persons (not less than five in any case) having one or more of the common objects mentioned in Section 141. Section 149 creates joint liability of all members of an unlawful assembly for criminal act done by any member in prosecution of the common object of the said assembly. So the essential ingredients of Section 149 are :

- (1) There must be an unlawful assembly, as defined in Section 141;
- (2) Criminal act must be done by member of such assembly;
- (3) Act done is for prosecution of the common object of the assembly, or such which was likely to be committed in prosecution of the common object;
- (4) Members have voluntarily joined the unlawful assembly and know the common object of the assembly.

DIFFERENCE BETWEEN SECTIONS 34 AND 149: To a certain extent both sections are overlapping and both can be invoked against the accused when there is no difference between the object or intention with which the offence is committed. But it was pointed out in a case by the Privy Council that there is much difference in the scope and applicability of Sections 34 and 149 in spite of their similarity. Section 149 is wider in its sweep and longer in its reach than Section 34. The actual participation in action is the essential element of Section 34 but membership of unlawful assembly is the leading feature of Section 149. Section 34 merely declares a rule of criminal liability but Section 149 creates a specific offence. Common object is different than common intention as it does not require prior concert and a common meeting of minds but an unlawful object can develop after people assemble together. At

least 2 persons are required to share the common intention under Section 34 but for applicability of Section 149 unlawful assembly must consist of at least 5 persons. Hence both the Sections 34 and 149 deal with cases of constructive criminality under Section 34 the accused can be held liable only for the offence committed in furtherance of common intention whereas under Section 149 he can be held liable not only for the act done in prosecution of the common object of the assembly but also for the acts which were likely to be committed in prosecution of that object. There is no question of common intention in Section 149. Hence every member of the unlawful assembly would be guilty of the offence committed by it even though there may not have been any common intention as to actual commission of that offence. The last but not least point of difference between two sections is that the common intention may be of any type while the common object must be one of the objects mentioned in Section 141, which defines the term lawful assembly.

The words "in furtherance of the common intention of all" are a most essential part of Section 34 of the Penal Code. It is common intention to commit the crime actually committed. This common intention is anterior in term to the commission of the crime. Common intention means a pre-arranged plan. On the other hand, Section 149 speaks of an offence being committed by any member of an unlawful assembly in prosecution of the common object of that assembly. The distinction between "Common intention" under Section 34 and common object under Section 149 is of vital importance.

Q. 15. What is the Law in the Pakistan Penal Code regarding joint offenders ?

Ans. JOINT OFFENDERS: The law with regard to joint offenders is enshrined in Sections 34, 35, 37 and 38, which may be discussed below :

(1) When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. (S. 34).

(2) Whenever an act, which is criminal only, by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with the knowledge or intention. (S. 35).

The preceding section, viz., Section 34, deals with a case where a criminal act was done by several persons in furtherance of the common intention of all and each one is held guilty of the

principal offence as if the act had been done individually by him. This section provides that where the element of a particular knowledge or intention constitutes the composition of an offence, all the participators in the act must be shown to have that particular knowledge or intention in common in order to be liable for a crime committed by any one of them. In other words, if several persons jointly committed a murder, with each having a different intention or knowledge from the others, each is liable according to his own criminal intention or knowledge and nothing beyond that. Thus X and Y beat Z who dies. X had an intention to murder him and knew that the act would cause death; but Y had only the intention of causing grievous hurt and did not know that his act would cause death or such bodily injury as was likely to result in death. X is guilty of murder and Y of causing grievous hurt.

(3) When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any of those acts, either singly or jointly with any other persons, commits that offence. (S. 37).

Illustrations: (a) A and B agree to murder Z severally and at different times giving him small doses of poison and administer the poison according to the agreement. Z dies from the effects of several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and, as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate. (b) A and B are joint jailors, and, as such, have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose, Z dies of hunger. Both A and B are guilty of the murder of Z.

(4) Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. (S. 38).

Illustration : A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

This section is both supplement and converse to Section 34, Section 38 obviously covers two different situations, viz., (1) where several persons act together in furtherance of common intention, the

punishment varying according to circumstances, as in the illustration to Section 38 above, and (2) where there is action in common but a difference in the intentions of the participants. In the first case the section is a supplement to Section 34, but in the latter case it is converse to that section.

Q. 16. Define (1) Illegal; (2) Legally bound to do; and (3) Voluntarily?

Ans. (1) ILLEGAL : The word "illegal" is applicable to every thing which is an offence or which is prohibited by law, or which furnishes ground for a civil action. (S. 43).

(2) LEGALLY BOUND TO DO : A person is said to be "legally bound to do" whatever it is illegal in him to omit. (S. 43). The prohibition not to do must be a legal prohibition. If there is a legal prohibition it does not matter whether the breach gives rise to a penal offence, civil wrong or more contractual liability.

(3) VOLUNTARILY : A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it. (S. 39). A sets fire by night to an inhabited house in a large town for the purpose of facilitating robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that the death has been caused by his act ; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

Q. 17. What do you understand by "Good faith" ?

Ans. GOOD FAITH : Good faith has not been defined in the Pakistan Penal Code in positive terms. Section 52 of the Code gives only a negative definition by saying that "nothing is said to be done or believed in 'good faith' which is done or believed with-out due care and attention." Absence of good faith according to the Code, only means carelessness or negligence. Mere good faith in the sense of simple belief with any grounds for believing is not sufficient; the belief must be some reasonable, not an absurd belief; that is, there must be some reasonable ground for it. Good faith requires due care and attention. The phrase "due care and attention" implies genuine effort to reach the truth and not ready acceptance of an ill-natured belief. It has been held that when a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention but that he exercised such care and skill as the duty reasonably demanded for its due discharge.

The question of good faith varies in different cases and must be considered with reference to the circumstances of the case and the capacity and intelligence of the person whose conduct is in question. The law does not expect the same care and attention from

all persons regardless of the position they occupy. It varies in different cases. Thus where a police constable suspected *bona fide* that a person was carrying stolen property and he arrested the accused on getting an unsatisfactory reply, it was held that the constable acted in good faith and was protected under Section 79 of the Code.

The above negative definition of "good faith" differs materially from its ordinary connotation where a thing is deemed to be done in good faith when it is done in fact honestly. Even Section 3 (20) of the General Clauses Act gives expression to popular connotation by defining "good faith" as under : "A thing shall be deemed to be done in 'good faith' where it is, in fact, done honestly whether it is done negligently or not." But we have seen above that under the Pakistan Penal Code this definition is inapplicable as according to the Code if a thing is done honestly but negligently without due care and attention it is not done in good faith. In fact, under the definition in the Code, the question of honesty is immaterial.

Q. 18. How far is 'Good faith' a good defence in an action under the Pakistan Penal Code ?

Ans. PLEA OF GOOD FAITH AS DEFENCE : The Code recognises the plea of "good faith" as a good defence in the following cases:--

- (1) Act done by a person who, by reason of a mistake of fact, in good faith, believes himself to be bound by law to do it (S. 76) ;
- (2) Act of a Judge when acting judicially in the exercise of any power which, in good faith, he believes to be given to him by law (S. 77) ;
- (3) Act done pursuant to the judgment or order of a Court, if done whilst such judgment or order remains in force, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction (S. 78).
- (4) Act done by a person who, by reason of a mistake of fact, in good faith, believes himself to be justified by law in doing it (S. 79) ;
- (5) Act done in good faith for the benefit of a person even without that person's consent (S. 92) ;
- (6) Communication made in good faith even though harm may ensue to the person to whom it is made provided it is made for the benefit of that person (S. 93) ;

- (7) Culpable homicide is not murder if the offender being a public servant or aiding a public servant or acting for the advancement of public justice exceeds the powers given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty (S. 300, *Exception 3*) ;
- (8) Obstruction of a private way over land or water which a person, in good faith, believes himself to have a lawful right to obstruct is not an offence of wrongful restraint (*Exception to Section 339*) ; and
- (9) Expression in good faith of any opinion respecting the conduct or character of a public servant in the discharge of his public duties, respecting the conduct or character of any person touching any public question, respecting the merits of any case decided by a Court of conduct of witnesses and respecting the merits of any performance of an author, censure passed in good faith by a person having lawful authority over another, accusation preferred in good faith to an authorised person, imputation made in good faith by a person for protection of his or other's interests and caution conveyed in good faith for the good of the person to whom conveyed or for public good. (S. 499).

Q. 19. Explain the expression "Constructive liability"?

Ans. CONSTRUCTIVE LIABILITY : Constructive liability under the Code may arise in three well defined cases. A person may be constructively liable for an offence which he did not actually commit by reason of--

- (1) the common intention of all to commit such an offence (S. 34);
 - (2) his being a member of a conspiracy to commit such an offence (S. 121-A);
 - (3) his being a member of an unlawful assembly, the members whereof knew that an offence was likely to be committed.
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CHAPTER III

OF PUNISHMENTS

(Ss. 53-75)

Q. 20. What are the Objects & Purposes of punishment ?

Ans. OBJECTS & PURPOSES : The object and purpose of punishment is the prevention of crime and every punishment is intended to have double effect, *viz.*, to prevent the person who has committed a crime from repeating the act or omission and to prevent other members of the community from committing similar crimes. The main object of awarding punishments for offences is to create such atmosphere which may become a deterrence for the people who have propensities towards crime and thereby prevention of offences so that the society in which all the members have to live may not feel suffocated, disturbed and prone to unhealing environment. The measure of punishment, therefore, must vary from time to time according to the condition of a particular crime and other circumstances. The object of punishment being preventive penal policy of state should be to protect the society.

The four different theories of punishment are the following:-

1. **DETERRENT :** According to this theory the punishment is awarded to deter people from committing the crime. Emotion of fear play a vital role in man's life. The people fear to commit the crime because it will render them to suffer. The fear of punishment puts a check not only on criminal from committing further crime but also on all other evil minded. In spite of its weaknesses this has not entirely been eliminated from the policy of modern Court of criminal justice. Hegel strongly supported this theory.

2. **RETRIBUTIVE :** The theory is based on the principle of an eye for eye and tooth for tooth. The offender should be punished according to the nature of injury caused by him to the victim. In other words punishment should be in proportion to the injury caused by the accused. This theory does not look to the motive but to the intention in committing the crime. According to Salmond, "To suffer punishment is to pay a debt due to the law that has been violated."

3. **PREVENTIVE :** This has also been called "Theory of disablement" as it aims at, preventing the crime by disabling the criminal. In order to prevent the repetition of the crime the offenders are punished with death, imprisonment for life. For example, a murder is committed by A, and he is punished. Here A is punished not for having committed the murder, but in order that no further murder be committed. This theory has been committed by many writers on the ground that prevention of crime can also be done by reforming the behaviour of the criminal.

4. REFORMATIVE : The object of punishment according to this theory should be to reform the criminals. The crime is mental disease which is caused by different anti-social elements. Therefore, there should be mental case of the criminals instead of awarding them severe punishment. Much truth lies in the statement that to open a school is to close a prison. If persons of criminal crime are so educated and trained that they are made complement to carry on well in society. There will be little or not at all possibility of any crime being committed by them. The punishment, therefore, should be curative or corrective become no body could cure by killing. In modern times much importance is given to reformation or rehabilitation of the criminals, specially the young offenders in whose case this theory has very successfully been applied. This theory has, however, failed in cases of professional and habitual offenders.

From the above discussion this is clear that neither theory can be adopted as sold standard of punishment for the perfect Penal Code. The correct view, therefore, seems to be that the perfect system of criminal justice is the result of compromise between the under lying principles of all the theories.

Punishment under Penal Code : The scheme of the punishment is laid down from Sections 53 to 75 of the Penal Code out of which five sections (Ss. 56, 58, 59, 61 and 62) have already been repealed. Different types of punishment, rules for their assessment and enhancement in subsequent offence, form the subject matter of this topic.

Punishment in Islam : The punishment in Islam in its nature, is deterrent as well as reformative. Recent researches reveal that imprisonment is and has, in fact proved itself to be a source of producing criminals, besides bringing a burden on public exchequer. Fine, as prescribed in various modern legislative enactments, has miserably failed to achieve the desired result. It neither brings any reformatory virtue to the criminal nor put any deterrent effect on him. Specially in these days when the money value has gone down tremendously, the century old scale of fines fail to produce any effect on the mind of the criminal. It is suggested that provisions, relating to imposition of fine and/or prescribing imprisonment in various enactments of may be reconsidered in the light of their effects on reforming the criminal *vis-a-vis* the Islamic principles of punishment. It is certain that if the question received in this perspective the fine will either be increased at least 20 is times or will receive a good bye. The imprisonment should rather be substituted by imposing physical punishments.

Islamic Law has also known additional forms of punishment. The man who is convicted of false accusation of fornication for

example, is deprived of the right of testimony, a penalty which corresponds to some extent to the loss of civil status which accompanies some convictions, today. The offences which fall under each of these categories of punishment are well established in Islamic Law.

Punishments under Islamic Law are indeed very strict and deterred but very strict proof is also required to find guilty. The punishments are not only redressive and retributive but also reformatory. Punishments in Islam are of three kinds:--

- (1) *Hadd* (2) *Qisas*; and (3) *Tazir*.

According to Section 53 as amended by the Criminal Laws (Amendment) Act II of 1997, the offenders are liable to the following punishments:-

- | | |
|----------------------------|---|
| (1) Qisas; | (2) Diyat; |
| (3) Arsh; | (4) Daman; |
| (5) Tazir; | (6) Death; |
| (7) Imprisonment for life; | (8) Imprisonment which is of two descriptions, viz; |
| | (i) Rigorous i.e., with hard labour; |
| | (ii) simple. |
| | (9) Forfeiture of property; |
| (10) Fine. | |

According to the case of *Muhammad Ashraf v. State*, **PLD 1991 Lah. 347**, the substitution of the Islamic Penal Code by the Ordinance is not a mere change in the form of nomenclature but change in substance, content, meaning and the consequences flowing therefrom. Any apparent similarity in two provisions e.g; culpable homicide amounting to murder and qatl-i-amd is not to mislead.

The Code prescribes death sentences in the following cases at the discretion of the Court.

- (a) Waging war against the Government; (S. 121).
- (b) Abetment of mutiny committed; (S. 132).
- (c) Fabricating or giving false evidence as a result of which an innocent person suffers death. (S. 194).
- (d) Murder (qatl-i-amd) (S. 302).
- (e) To abet an insane, minor or in conceited to commit suicide. (S. 305).
- (f) Dacoity with murder (S. 396).

There is only the case where death sentence is a must i.e., when life prisoner in attempt to murder causes hurt. In all other cases life imprisonment is alternative to death sentence. Imprisonment for life for the purpose of calculation means imprisonment for 25 years (S. 57).

In cases of rigorous imprisonment the prisoner is put to hard labour while in simple imprisonment he is confined to jail only.

There is also a third type of confinement known as solitary confinement. This can only be awarded to persons punished with rigorous imprisonment with the condition that whole period of solitary confinement should not exceed three months. Thus the solitary confinement can only be awarded for the offences under the Penal Code in most exceptional cases. Sections 73 and 74 of the Penal Code lay down the rule about solitary confinement.

Fine : Where no specific amount to be imposed as fine is mentioned, it shall be discretionary but not excessive. If punishment awarded for offence is fine only or imprisonment with fine, Court should direct that in default of payment of the fine, the accused shall be imprisoned for a certain term which should be in addition to imprisonment already awarded. (Sections 63 and 64).

Q. 21. What elements are taken into consideration in determining the appropriate punishment?

Ans. ELEMENTS DETERMINING APPROPRIATE PUNISHMENT : In every crime there are three elements to be taken into account in determining the appropriate measure of punishment.

These are:-

- (i) the motive to the commission of the offence;
- (ii) the magnitude of the offence; and
- (iii) the character of the offender.

(i) **Motive of the offence :** Other things being equal the greater the temptation to commit a crime the greater should be the punishment. This is an obvious deduction from the principles of criminal liability. The object of punishment is to contract by the establishment of contrary and artificial motives the natural motives which lead to crime. The stronger these natural motives the stronger must be the counter actives which the law supplies. If the profit to be derived from an act is great, or the passions which lead the men to it are violent, a corresponding strength of violence is an essential conviction of the efficacy, of respective discipline. This principle, however, is subject to a very important limitation and there are may cases in which enters temptation is a ground of extenuation rather than of increased severity of punishment.

(ii) **Magnitude of the offence :** Other things being equal, the greater the offence, that is to say the greater the sum of its evil consequences or tendencies, the greater should be its punishment. At first sight indeed it would seem that this consideration is irrelevant. Punishment it may be thought should be measured solely by the profit derived by the offender, not by the evils caused to other persons; if two crimes are equal in point of motive, they should be equal in point of punishment, notwithstanding the fact that one of them may be many times more mischievous than the other. This, however, is not so, and the reason is twofold.

- (a) The greater the mischief of any offence the greater is the punishment which it is profitable to inflict with the hope of preventing it. For the greater this mischief the less is the proportion which the evil of punishment bears to the good of prevention, and therefore, the greater is the punishment which can be inflicted before the balance of good over evil attains its maximum. Assuming the motives of larceny and of homicide to be equal, it may be profitable to inflict capital punishment for the latter offence, although it is certainly unprofitable to inflict it for the former. The increased measure of prevention that would be obtained by such severity, would, in view of the comparatively trivial nature of such offence, be obtained at too great a cost.
- (b) A second and subordinate reason for making punishment vary with the magnitude of the offence is that; in those cases in which, different offences offer themselves as alternative to the offender, an inducement is thereby given for the preference of the least serious. If the punishment of burglary is the same as that of murder, the bungler has obvious motives, for not stopping at the lesser crime. If an attempt is punished as severely as a complete offence, why should any man repeat of his half executed purpose.

(iii) **Character of the offender :** The worse the character or character or the disposition of offender the more severe should be his punishment. Badness of disposition is constituted either by the strength of the impulse to crime, or by the weakness of the impulses towards law abiding conduct. One man may be worse than another because of the greater strength and prevalence within him of such antisocial passions as anger, coetousness of a malice; or his badness may lie in a deficiency of those social impulses and instincts which are the springs of right conduct in normally constituted men. In respect of all the graver forms of law breaking, for one man who also lains, from them for fear of the law there are thousands who abstain's reason of quite other influences. Their sympathetic instincts, their

natural affections, their religious beliefs, their love of the approbation of others, their pride and self respect, render superfluous, the threatening of the law. In the degree in which these impulses are dominant and operative, the disposition of man is good; in the degree in which they are wanting or inefficient, it is bad.

In both of its kinds badness of disposition is a ground for severity of punishment. If a man's emotional constitution is such that normal temptation acts upon him with abnormal force, it is for the law to supply in double measure, the counteractive; of penal discipline. If he is so made that the natural influences towards well doing fall within the level of average humanity, the law must supplement them by artificial influences of a strength that is needless in ordinary cases.

Any fact, therefore, which indicates depravity of disposition is a circumstance of aggravation, and calls for a penalty in excess of that which would otherwise appropriate to the offence. One of the most important of these facts is the repetition of crime by one who has been already punished. The law rightly imposes upon habitual offenders, penalties which bear no relation either to the magnitude or to the profit of the offence. A punishment adopted for the normal men is not appropriate for those who, by their repeated defiance of it prove their possession of abnormal natures. A second case in which the same principle is applicable is that in which the mischief of an offence is altogether disproportionate to any profit is be derived from it by the offender. To kill a man from mere wantonness merely in order to facilitate the picking of his pocket, is a proof of extraordinary depravity beyond anything that is imputable to him who commits homicide only through the stress of passionate indignation or under the influence of great temptation. A third case is that of offences from which normal humanity is adequately dissuaded by such influences as those of natural affection. To kill one's father is in point of magnitude no worse a crime than other homicide, but it has at all times been viewed with greater abhorrence, and by some laws punished with greater severity, by reason of the depth of depravity which it indicates in the offender. Lastly it is in the same principle that wilful offences are punished with general rigour than those which are due merely to negligence.

An additional and subordinate reason for making the measure of liability depend upon the character of the offender is that badness of disposition is commonly accompanied by deficiency of sensibility. Punishment must increase as sensibility diminishes. The more depraved the offender the less he feels the shame of punishment; therefore, the more he must be made as feel the pain of it. A certain degree of even physical insensibility is said to characterise those who commit crimes, of violence; and the indifference with which death itself is faced by those who in the callousness of their hearts have not

scrupled to inflict it upon others in a matter of amazement to normally constituted men. As a general rule the apparent paradise involved in the rule that punishment must increase with the temptation to the offence is true; but it is subject to a very important qualification. For in certain cases the temptation to which a man succumbs may be of such a nature as to rebut that preemption of bad disposition which would in ordinary circumstances arise from the commission of the offence. He may, for example, be driven to threat not by the strength of any bad or self regarding motives, but by that of his social or sympathetic impulses., in such a case the greatness of the temptation, considered in itself, demands, severity of punishment but when considered as a disproof of the degraded disposition which usually accompanies wrong doing it demands leniency; and the latter of these two conflicting considerations may be of sufficient importance to outweigh the other. If a man remains honest until he is driven in despair to steal food for his starving children, it is perfectly committed with the deferment theory of punishment is to deal with him less severely than with him who steal, from no motive other than cupidity. He who commits homicide from motives of petty gain, or to attain some trivial purpose, deserves to be treated with the utmost severity, as a man thoroughly callous and depraved. But he who kills another in retaliation for some intolerable insult or injury need not be dealt with according to the measure of his temptations, but should rather be excused on account of them.

Q. 22. What are various kinds of punishments under the provisions of Pakistan Penal Code ? What punishments in default of payment of fine can be awarded ?

Ans. PUNISHMENTS UNDER P.P.C. : According to Section 53 following kinds of punishments are under the provisions of Pakistan Penal Code,---

- Firstly :* Qisas
- Secondly :* Diyat
- Thirdly :* Arsh
- Fourthly :* Daman
- Fifthly :* Ta'zir
- Sixthly :* Death
- Seventhly :* Imprisonment for life
- Eighthly :* Imprisonment which is of two descriptions namely:
 - (i) Rigorous, i.e., with hard labour.
 - (ii) Simple.
- Ninthly :* Forfeiture of property.
- Tenthly :* Fine

The section mentions six kinds of punishments, but two more are added by subsequent enactments, *viz.*, whipping and detention in reformatories under the whipping Act (VI of 1864) and the Reformatory Schools Act (VIII of 1887).

The main object of awarding punishments for offences is to create such atmosphere which may become a deterrence for the people who have propensities towards crime and thereby prevention of offences so that the society in which all the members have to live may not feel suffocated, disturbed, unsafe and prone to unhealthy environment. The measure of punishment must, therefore, vary from time to time according to the condition and the quantum of punishment imposed in other cases cannot be of much assistance.

Sentence of imprisonment for non-payment of fine :

In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may be liable under a commutation of sentence.

Imprisonment as well as fine : The words 'as well as' do not mean here and, as will be seen from the concluding words of the first clause, *viz.*, 'whether with or without imprisonment'. The words 'imprisonment as well as fine' include (a) offences punishable with imprisonment or fine in the alternative and (b) offences punishable with imprisonment or fine, or both, cumulatively.

'It shall be competent' : It is not imperative to award a term of imprisonment in default of payment of the fine. It is merely permissive.

This section enables the Courts in every case in which an offender is sentenced to fine to direct that in default of payment of the fine the offender shall suffer imprisonment. Imprisonment, in default of payment of fine may be awarded even where the statute creating the offence provides only for the fine and not for imprisonment in default.

Section 64, Penal Code confers upon Court powers of imprisonment in default of payment of fine which often acts as a screw to make offender choose lessor of two evils. Trial should exercise a careful discretion in matter of super imposing fines upon long substantive term of imprisonment. Imposition of fines on persons sentenced to death was held to be unnecessary.

"As well as fine" : The words "as well as" do not mean here "and" as will be seen from the concluding words of the first clauses, viz., 'whether with or without imprisonment'. The words 'imprisonment as well as fine' include (a) offences punishable with imprisonment or fine, or both cumulatively.

The word 'offence' in the section means not only an offence punishable under the Code but includes an offence, under any special or local law.

Sentence of imprisonment in lieu of fine should run in addition to the sentence imposed for the offence.

In a case of Lahore High Court it was held that no sentence in default of payment of fine was passed but it was directed that if the fine is not paid by the accused before the date fixed, the warrant issued for its realisation by sale and attachment of movable and immovable property of the accused.

Sentence of imprisonment in default of fine not to run concurrently with other sentence of imprisonment: A sentence of imprisonment in lieu of fine cannot be ordered to run concurrently with a substantive sentence of imprisonment. Section 64 of the P.P.C. permits two substantive sentences to run concurrently, but the sentence of imprisonment in lieu of fine has to be served out separately. That sentence cannot run concurrently with any other sentence of imprisonment.

Any sentence of imprisonment in default of fine has to be in excess of and not concurrent with, any other sentence of imprisonment to which the accused may have been sentenced. Where a Court imposes two sentences of imprisonment on an accused person and orders him to pay fine on each of the two counts with imprisonment in default of payment to run concurrently, but the terms of imprisonment inflicted in default of payment of fine must run consecutively.

Q. 23. What do you understand by solitary confinement? What are its provisions in the Pakistan Penal Code?

Ans. SOLITARY CONFINEMENT : This is a kind of imprisonment which secludes the prisoner from any intercourse or sight of and communication with other prisoners. It may be accompanied with or without labour.

Section 73 of the Code provides that whenever any person is convicted of an offence for which under the Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole.

*Terms of imprisonment**Solitary confinement*

not exceeding six months

a time not exceeding one month;

exceeding six months, but not exceeding one year

time not exceeding two months;

exceeding one year

a time not exceeding three months.

It is clear from the above that a sentence inflicting solitary confinement for the whole term of imprisonment is illegal. It must bear only a portion of the term of imprisonment.

Section 74 of the Code further limits the solitary confinement by providing that in executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Solitary confinement as a rule is not ordered unless there are special features appearing in the commission of the offence.

Q. 24. Write a short note on forfeiture of property as a punishment prescribed by Pakistan Penal Code?

Ans. FORFEITURE OF PROPERTY : Sections 61 and 62 of the Pakistan Penal Code, which provided for absolute forfeiture of all property of the offender, have now been repealed. There are, however, three cases in which specific property of the offender is liable to forfeiture, *viz.*;

- (1) where depredation is committed on territories of any power at peace with Pakistan, such property as is used or intended to be used in committing such depredation is liable to forfeiture in addition to sentence of imprisonment and fine (S. 126) ;
- (2) where property is received knowing the same to have been taken in the commission of depredation on the territories of any power at peace with the Government of Pakistan, or in waging war against any Asiatic power of peace with the Government of Pakistan the property so received is liable to forfeiture (S. 127) ; and
- (3) a public servant unlawfully buying or bidding for property forfeits the property so purchased. (S. 169).

Q. 25. What are the various provisions of the Pakistan Penal Code with regard to character and duration of the sentence of imprisonment in default of payment of fine ? Within what period the fine imposed on a person convicted of an offence be levied ?

Ans. IMPRISONMENT IN DEFAULT OF PAYMENT OF FINE : The relevant provisions in regard to imprisonment in default of payment of fine are embodied in Sections 65 to 70 of the Pakistan Penal Code.

CHARACTER OF THE SENTENCE OF IMPRISONMENT : The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence. Thus, if the offence is punishable with rigorous imprisonment, it follows the additional term of imprisonment in default of payment of fine must be rigorous (S. 66). However, if the offence is punishable with fine only, the imprisonment in default of payment of fine shall be simple.

DURATION OF THE SENTENCE OF IMPRISONMENT : Section 65 lays down that the term of imprisonment in default of payment of fine should not exceed one fourth of the maximum term of imprisonment fixed for the offence. If the offence be punishable with imprisonment as well as fine.

If the offence be punishable with fine only the term for which the Court directs the offender to be imprisoned in default of payment of fine, shall not exceed the following scale :

<i>Amount of fine</i>	<i>Term of imprisonment in default of payment of fine.</i>
Not exceeding Rs. 50	Not exceeding 2 months;
Not exceeding Rs. 100	Not exceeding 4 months;
In any other case	Not exceeding 6 months; (S. 67)

The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied, i.e., realised by process of law. (S. 63).

If, however, before the expiration of the term of imprisonment, a proportion of the fine has been paid by the offender or obtained by such levy, a proportional abatement of the imprisonment shall follow. (S. 69) ; Thus if A is sentenced to a fine of Rs. 100 or to four months' imprisonment in lieu of fine, A will be released on the expiry of the first month if Rs. 75 of the fine be paid or levied before expiration of one month of the imprisonment and will be released at the end of two months if Rs. 50 of the fine be paid or levied before the expiration of two months of the imprisonment.

It may be observed that imprisonment in default of payment of fine does not exonerate the offender from his liability to pay the full amount of fine imposed on him, which can be realised from the movable as well as immovable property of the convict. Nor does the death of the offender discharge from the liability any property which would, after his death, be legally liable for his debts. There is, however, the bar of six years within which after the passing of the sentence the fine must be realised. If, however, the offender is liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period, the fine, or any part thereof which remains unpaid, may be levied, *i.e.*, realised. (S. 70).

Q. 26. State the law on cumulative penalties as stated in the Pakistan Penal Code and illustrate your answer?

Ans. CUMULATIVE PENALTIES : The law on cumulative penalties is enshrined in Section 71 of the Pakistan Penal Code, which reads as follows :

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

One or two illustrations will amply make the point clear. A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating. But, in another case, if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

The relevant provision in the Code of Criminal Procedure with regard to cumulative penalties is Section 235 and reading this section with Section 71 of the Pakistan Penal Code a four-fold result follows:

- (1) A repetition in the same transaction of several criminal acts of exactly the same character may constitute one

crime, *e.g.*, a number of blows on one person, a number of lies in one continuous deposition, or a number of articles stolen at one house-breaking.

- (2) A single transaction may give rise to either (a) several offences of a different character, each complete in itself and distinct from the other, *e.g.*, criminal breach of trust accompanied by falsification of accounts as a preliminary or a sequel to such a breach; or (b) several offences of the same character but affecting different persons. *e.g.*, a single gun-shot fired with criminal intent which injures two or more persons. Each such offence is separately indictable and punishable.
- (3) The same series of acts may constitute different offences. All may be charged, but only one offence may be regarded as committed for the purpose of inflicting punishment, *e.g.*, a person who sets fire to a warehouse, which is punishable both under Sections 435 and 436. Only one offence has been committed and the punishment must not exceed that applicable to the graver offence for it is a general rule that when, in the same penal statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it is so expressly provided.
- (4) An act, in itself an offence, may become either an aggravated form of that offence, or a different offence, when combined with some other acts, innocent or criminal. Thus a person who has committed house-breaking in order to commit theft, can be charged with, and convicted of, each of these offences.

Q. 27. What is the law with regard to enhanced punishment in the Pakistan Penal Code ?

Ans. ENHANCED PUNISHMENT : Section 75 of the Code provides that whoever, having been convicted by a Court in Pakistan of an offence punishable under Chapter XII or Chapter XVII of the Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or imprisonment of either description for a term which may extend to ten years.

The above section does not create a substantive offence, but only imposes a liability to enhanced punishment under the following conditions :

- (1) The previous conviction must have been under Chapter XII or Chapter XVII of the Pakistan Penal Code punishable with three years' imprisonment.
 - (2) The previous conviction must not have necessarily resulted in the awarding of three years' punishment, but must be an offence punishable with three years' imprisonment or more.
 - (3) The subsequent offence must have been committed after the previous conviction, i.e., the section is inapplicable to offences committed at one and the same time.
 - (4) The subsequent offence must be an offence punishable with three years' imprisonment or more.
 - (5) The subsequent offence must fall under Chapter XII or Chapter XVII and be punishable with three years' imprisonment or more before Section 75 can be made applicable.
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CHAPTER IV

GENERAL EXCEPTIONS

(Ss. 76-106)

Q. 28. When a person is accused of an offence the burden of proof is on the prosecution. What are the exceptions to this rule?

Ans. GENERAL EXCEPTIONS: The Chapter on General Exceptions to the Pakistan Penal Code forms an exception to the celebrated rule that an accused is presumed to be innocent unless and until the prosecution establishes by unimpeachable evidence that he is guilty of the offence with which he has been charged. The burden of proof, therefore, lies upon the prosecution to establish the guilt of the accused. Section 105 of Qanun-e-Shahadat, however, provides that if the accused wants to take benefit of any of the Exceptions provided in the Pakistan Penal Code, the burden of proving the existence of such circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code is upon him and the Court shall presume the absence of such circumstances.

Such Exceptions have been provided in Chapter IV, comprising Sections 76 to 106 of the Code. They also denote the circumstances where a man is justified in committing acts which would otherwise be offences. They may be summarised as below :

1. *Mistake of fact :*
 - (a) act done by a person bound, or by mistake of fact believing himself bound, by law (S. 76); and
 - (b) act done by a person justified, or by mistake of fact believing himself justified, by law. (S. 79).
2. *Judicial acts :*
 - (a) act of a Judge when acting judicially (Section 77) ; and
 - (b) act done by officers pursuant to the judgment or order of the Court. (Section 78).
3. *Accident :*
 - (a) act caused by accident. (Section 80).

4. *Absence of criminal intent:*
- (a) act done with the knowledge that it is likely to cause harm, but done without criminal intent and to prevent other harm (Section 81).
 - (b) act done in good faith for the benefit of a person without consent (Section 92).
 - (c) communication made in good faith (Section 93).
 - (d) act done under threat of death. (Section 94).
5. *Incapacity to commit crime:*
- (a) act of a child under seven years (Section 82).
 - (b) act of a child above 7 and under 10 years, but of immature understanding (Section 83).
 - (c) act of a person of unsound mind (Section 84).
 - (d) act of an intoxicated person when the thing which intoxicated him was administered to him without his knowledge or against his will (Section 85).
6. *Consent :*
- (a) act not known to be likely to cause death or grievous hurt, done by consent of the sufferer (Section 87) ;
 - (b) act not intended to cause death done by consent of the sufferer (Section 88).
 - (c) act done in good faith for the benefit of a child under 12 years or an insane person with the consent of the guardian. (Section 89).

7. *Trifling acts* : acts causing slight harm (Section 95).
8. *Private defence* : (a) of body (Ss. 96-102, 104 and 106).
(b) of property (Ss. 96-99, and 103-105).

Q. 29. Homicide is ordinarily classified as "Justified", "Excusable" or "Felocious"? Discuss.

Ans. A. JUSTIFIABLE HOMICIDE: --

- (a) Homicide is justifiable when it is committed by a person who is bound or by a mistake of fact, in good faith, believes himself bound, by law.

Illustration (i): A, a soldier, fires on a mob, by the order of his superior officer, in conformity with the commands, of the law. A has committed no offence.

- (b) A, an officer of a Court of justice, being ordered by that Court to arrest Y, and after due enquiring, believing Z to be Y arrest Z. A has committed no offence.

Section 76, PPC excuses a person who has committed an offence, under a misconception of facts, which led him to believe in good faith that he was committed by law to do it. An act done by mistake of fact in good faith and not by reason of a mistake of law has been given exemption from penal action. The maxim "*ignorantia facit excusari*", "*ignorantia, juris non-excuset*" is the basis of Section 76, P.P.C. It means ignorance of fact excuses; ignorance of law does not excuse.

- (b) By a person who is justified or, by a mistake of fact, in good faith believes himself to be justified by law. [S. 79, P.P.C]

Illustration:-- A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murderers in the act seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self defence.

- (c) By a judge acting judicially in the exercise of any power which he possess or, in good faith, he believes to possess, under law [S. 77, P.P.C.] Section 77, P.P.C. protects judicial officers and their

ministerial staff from criminal process just as judicial officers Protection Act protects them from civil liability.

Two ingredients must be brought out by a person who acts as judge while acting judicially to avail the protection provided by Section 77, P.P.C. These are:--

- (i) when the act is done in exercise of powers giving by law.
- (ii) when the act is done in good faith to be the exercise of such powers.

Under Section 77, P.P.C. a judge is exempted not only in those cases in which he proceeds, irregularly. The exercise of a power which the law gives to him but also in cases when he, in good faith, exceeds, his jurisdiction and has no lawful power.

- (d) By a person acting in good faith and pursuant to the judgment or order of a Court. [S. 78]

Section 78, PPC offords, protection to officers acting under the authority of a judgment or order of a Court of justice. It differs from Section 77 on the question of jurisdiction. Here, the officer is protected in carrying out an order of a Court which may have no jurisdiction at all if he believed that the Court had (jurisdiction ; whereas under Section 77 the judge must be acting within his jurisdiction to be protected by it :-

- (e) By a person acting without any criminal intention to cause harm, and in good faith to avert other harm to person a property (S. 81, PPC).

Illustration : (a) A, the captain of a steam vessel, suddenly without any fault or negligence on his part, finds, himself in such a position that, before he can stop his vessel, he must inevitably rundown a boat B, with twenty or thirty persons on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat 'C' with only two framengem on board, which he may possibly clear. Here, if A alters his course without any intention to rundown the boat 'C' and in good faith for the purpose of avoiding in this section is going to be committed, to inflict. (i) death, or (ii) any other harm to the assailant either when the assault is attempted or directly threatened. But the exercise of this right is restricted to the limits mentioned in Section 99 and the apprehension must be reasonable and the violence inflicted must not be out of all proportions to the apprehended danger. It must be reasonably necessary for the purpose of self

defence. As for instance, a person is not justified in shooting another who is about to arrest him when there is nothing to show that he has reason to apprehend that any of the acts mentioned in Section 100, P.P.C. would ensure.

B. EXCUSABLE HOMICIDE.

- (a) Where death is caused by accident or misfortune in the doing of a lawful act, in a lawful manner by lawful means with proper care and caution without any criminal intention or knowledge. [Section 80].

Illustration: -- A is at work with a hatchet; the head flies off and kills a man who is standing by. Here if there was no want of proper condition on the part of A, his act is excusable and not an offence

Section 80, P.P.C. exempts the doer of an innocent or lawful manner and without any criminal intention or knowledge from any unforeseen evil result that may ensue from accident or misfortune. The essence of the exemption is the complete absence of criminal intention or knowledge :

An accident is something that happens out of the ordinary cause of things.

A big party went for shooting pigs. A bear rushed towards the accused who fixed at it but missed the bear and the shot hit the leg of a member of the party. It was held that the case was of an accident but not one of rash or negligent shooting and the accused was acquitted:

- (a) where the act is done in good faith for a person's benefit. [S. 92, P.P.C]

Illustrations : -- Z is thrown from his horse and is insensible . A, a surgeon finds that Z requires the trepanned. A not intending Z death law in good faith for Z's benefit performs the trespass before Z recovers his power of judging for himself. A has committed no offence

- (b) *Z is carried off by a tiger :* A fires at the tiger knowing it to be likely that the shot may kill Z but not intending to kill Z and in good faith intending Z to benefit. A's ball gives Z a nostril wound. A has committed no offence;

(c) where it is done by a person with deranged or immature mind. (Ss 82-85).

(i) No child under the age of seven years can be guilty of a crime.

(ii) Acts done by persons of un-sound mind are protected.

(iii) Acts of a child above seven and under twelve of immature understanding are protected.

(iv) A person would be exonerated from liability for doing an act while in a state of intoxication if he, at the time of doing it, by reason of intoxication was:-

(a) incapable of knowing the nature of the act, or

(b) that he was doing what was either wrong or contrary to law.

C. FELONIOUS HOMICIDE: --

1. CULPABLE HOMICIDE : This offence is described to be the causing of death of doing an act with at least the knowledge in the actor that his act is likely to cause death. If there is something else than knowledge for example, intention ; the offence may or may not be culpable homicide. If there is something less than knowledge of the likelihood of his causing death, the offence may amount to culpable negligence, but it will not be homicide. In determining the nature of the offence regard must be had to the essential elements which are common in all such offences (i) the mentality of the accused (ii) the nature of the act and (iii) its effect upon the human victim. The first may present itself in its most dismal form, as where a person commits murder for the sake of rape or robbery. It may assume its least culpable aspect where death is the consequence of his negligence. In the one case there was deliberation, in the other there was no deliberation at all. But there are not the extreme cases, nor cases, necessarily antithetical. For there may be an intention to kill and yet the homicide may be justifiable.

(ii) Causing death by rash or negligent act not amounting to culpable homicide.

Any rash or negligent act. This expression includes any act done rashly or negligently, but not intentionally or designedly. A rash act is primarily an over hasty act, and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and

caution, Negligence is the breach of a duty caused by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.

If any person under eighteen years of age, any insane person, any delirious person any idiot, or any person in a state of intoxication commits suicide shall be punished with death, or imprisonment for a term not exceeding ten years and shall also be liable to fine. (S. 305)

If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine. (S. 306)

S. 306 applies only when a person has committed suicide. Suicide is self destruction and it may be committed in many ways in which it is possible to destroy life. In order to be suicide the person who commits suicide must commit it by himself. If he is killed by another with his consent, the offence is homicide and not suicide.

Q. 30. Explain and illustrate the proposition that the mistake of fact is a good defence while mistake of law is no defence in the Pakistan Penal Code?

Ans. MISTAKE OF FACT AND MISTAKE OF LAW :
The above proposition is based on the maxim "*ignorantia facti excusat ; ignorantia juris non excusat*"; that is, ignorance of the fact excuses ignorance of law does not excuse. Everybody is presumed to know the law of the land and it would be extremely difficult to administer the law if it were open for an accused to set up the plea that he was ignorant of the fact that the act was prohibited and punishable. In criminal law, therefore mistake of act is a good excuse unless that mistake of slip be due to design, pre-arrangement or preconcert or be the result of carelessness and negligence.

Sections 76 and 79 of the Pakistan Penal Code embody the above proposition of law. The former section provides that nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it. Thus if A, a soldier, fires on a mob, by the order of his superior officer, in conformity with the commands of the law, he has committed no offence.

The appellant fired a shot on a person who had ostensibly done no legal wrong requiring such a drastic measure. The victim was not even guilty of trespass. The appellant knew that he had been detailed to perform a specific (guard) duty of a private nature at the bungalow of an officer, which had nothing to do with his military duties. To be a lawful command within the meaning of Section 33 of the Pakistan Army Act, 1952, the command must relate to a military duty, that is to say disobedience to it must end to impede, delay or prevent a military proceeding. A command given to a soldier to perform some domestic work not relating to military duty is not a lawful command : Held, that the appellant was not entitled to benefit of Section 76, P.P.C. Obedience to an illegal order, however, can be used in mitigation of punishment.

The act should, however, not be done in obedience to an unlawful order of one's superior. In the same way if A, an officer of a Court of justice, being ordered by that Court to arrest Y, and after due inquiry, believing Z to be Y, arrests Z, he has committed no offence.

The latter section, viz., Section 79, provides that nothing is an offence which is done by any person who is justified by law, or who, by reason of a mistake of fact and not by reason of a mistake of law, in good faith, believes himself to be justified by law, in doing it. A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith, of the power which the law gives to all persons apprehending murderers in the act, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence. Again, where the chowkidar in good faith took a person to be a thief and arrested him, the benefit of Sections 76 and 79 of the Pakistan Penal Code was allowed. Under both the sections the party accused must alleged that he believed in good faith that he was bound by law to do as he did or that being empowered by law to act in the matter, he acted to the best of his judgment in good faith.

The word "law" in the above proposition means the general law of the land and not the foreign law. The rule, however, applies equally to bye-laws, rules and regulations having the force of law as well. Every person of the age of discretion and *compos mentis* is presumed to know the law. Thus if an accused accompanying the bailiff for pointing out property of the judgment-debtor gave the door a push with the result that the wife of the judgment-debtor fell down

unconscious, it has been held that an offence under Section 352 (assault or criminal force) was committed for the bailiff, and not the accused was entitled to push the door. There is also an English case where two Frenchmen were charged with wilful murder because they had acted as seconds in a duel in which one man had met his death. They alleged that they did not know that killing an adversary in a fair duel amounted to murder in England. Their plea was, however, negatived. This case establishes that even the ignorance of law by a foreigner is not excusable.

Q. 31. What is an act excusable on the ground of its being done by accident or misfortune ? Cite illustrations.

Ans. ACCIDENT IN DOING A LAWFUL ACT : Section 80 provides that nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. A is at work with a hatchet ; the head files off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

The essential ingredients to constitute a justifiable plea of accident or misfortune are :

- (1) that the act was done by accident or misfortune ;
- (2) that it was done without any criminal intention ;
- (3) that it was the doing of a lawful act ;
- (4) in a lawful manner;
- (5) by lawful means; and
- (6) with proper care and caution.

It has been held that where two persons went out to shoot animals and agreed to take up certain position in the jungle and lie in wait, but after a while the accused heard a rustle and believing it to be an animal fired, in that direction but the shot killed his companion, the case was held to be one of pure accident, although the gun used was an unlicensed one. But where the accused was engaged in a fight in which a woman intervened, whereupon the accused aimed a blow at her, but it accidentally killed the infant she was carrying, it was held that the case was not protected by the provisions of Section 80 as the assault on the woman was a wrongful act.

Q. 32. Write a short essay on mens rea as a necessary element in criminal liability. How far is the principle of mens rea recognised in the Pakistan Penal Code ?

Ans. MENS REA : It is one of the principles of the English Criminal Law that to constitute guilt there must be guilty intent along with the act itself and that a crime is not committed if the mind of the person doing the act in question be innocent. The maxim governing the above proposition is *actus non facit reum, nisi mens sit rea.*, i.e. the act itself does not constitute guilt unless done with a guilty intent. There must be an intention to do some act before a person can be guilty of crime. In the words of Lord Kenyon "the intent and act must both concur to constitute a crime." Thus mens rea in the case of murder means malice aforethought; in the case of theft an intention to steal and in the case of receiving stolen goods knowledge that the goods were stolen.

The maxim, therefore, connotes that the act itself does not make a man guilty unless his intention was to commit a crime. You shoot a jackal but actually killed a man behind a bush who was concealed from your view. No offence has been committed if you were not negligent and the act will be excusable as an accident. You are working with a hatchet and the head flies off, killing a man who is standing by. There is no offence if you have taken proper precaution and the act is excusable as an accident. But if you kill a man under circumstances which afford you no legal justification. You are guilty of murder.

The maxim has, however, not so wide an application as it is sometimes considered to have. It has undergone a modification owing to the greater precision of modern statutes. A statute may be so framed as to make an act criminal whether there has been an intention to break the law or otherwise to do wrong or not. There is a large body of municipal law which is so conceived. Breach of the municipal bye-laws regulating the width of thoroughfares, the height of buildings, the thickness of walls, or bye-laws governing the general welfare, health, etc., constitute an offence, whether the person committing it had made an accidental miscalculation or an erroneous measurement. It is, therefore, not possible to apply the maxim generally to all statutes. What is necessary is to look at the object of each Act which is under consideration and see how far knowledge is of the essence of the offence created. Crimes are much more accurately defined by statutes today than they were before.

It has been laid down in that *mens rea* is an essential ingredient in every offence except in three cases :

- (1) Cases not criminal in any real sense but which in the public interests are prohibited under a penalty ;
- (2) public nuisances , and
- (3) cases criminal in form but which are really only a summary mode of enforcing a civil right.

The *maxim actus non facit reum, nisi mens sit rea* has, however, no application to the offences under the Pakistan Penal Code as the various offences are carefully defined under the Code and contain expressly a proposition as to the state of mind of the accused. The definitions clearly visualise that state of mind when they state whether the act must have been done 'voluntarily', 'knowingly', 'dishonestly', 'fraudulently', 'accidentally', or the like. Every ingredient of the offence is, therefore, stated in the definitions. The Chapter on General Exceptions governing all the offences defined in the Code deals with the general conditions which negative *mens rea* and thus exclude criminal responsibility.

Q. 33. Distinguish legal insanity from medical and mixed insanity?

Ans. Medical and legal standards of sanity are not identical. From the medical point of view, it is probably correct to say that the act of murder by itself denotes an unhealthy and an abnormal state of mind of the murderer, but from the legal point of view he is sane as long as he can understand that his act is contrary to law. If an accused person is aware that the act is one which he ought not to do and the act at the same time is contrary to law, he is punishable. Therefore to establish successfully a defence on the ground of insanity, it must be proved that an accused person at the time of committing the act was labouring under such a defect to reason, from disease of the mind as not to know the nature of his act and that what he was doing was wrong and contrary to law. On this legal concept of insanity no amount of queerness in habit, morbidity of temper, peculiarities of character or eccentricities of behaviour, or even aberrations of mind resulting in abnormality will constitute insanity for the purpose of Section 84 of the Pakistan Penal Code although they may be relevant factors for determining whether or not the accused was insane.

The medical insanity and legal insanity are not the same thing. The legal insanity as contemplated in Section 84, P.P.C. must be established by direct evidence in a case. The onus to prove the special plea of Section 84, P.P.C. lies on the accused. In order to get benefit of Section 84, P.P.C., it must be established beyond all reasonable doubt that the accused was insane and unable to understand what was wrong or contrary to law on the date of occurrence.

Legal insanity--Different from medical insanity : There is a vital distinction between medical insanity and legal insanity. If a person is capable of knowing the nature of his act or that he is doing what is either wrong or contrary to law, then he cannot claim protection under Section 84, P.P.C.

Moral insanity : This is a form of insanity when a man's intellectual faculties are sound, but his moral sense is affected or diseased. The functions of the mind are of a two-fold nature--those of the intellect, or faculty of thought, such as perception or judgment ; and, those of the moral sentiments and affections, the propensities and the passion, and the latter may be diseased while the intellectual faculties are sound. "We learn, however, that insanity affects **not** only the cognitive faculties of the mind which guide our actions, **but** also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the Law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties ; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words are left unimpaired."

Q. 34. (a) How far is drunkenness a defence to a crime?

(b) A was put on his trial for stealing the umbrella belonging to B. A in his defence pleaded that at the time of taking the umbrella he was intoxicated and erroneously believed that the umbrella was his own. Is the defence tenable ?

Ans. (a) CRIMINAL LIABILITY OF AN INTOXICATED PERSON : Section 85 lays down that nothing is an offence which is done by a person who, at the time of doing it, is

by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law, provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

The ingredients of this section are that a person will be exonerated from liability for an act done while in a state of intoxication if he at the time of doing it, by reason of intoxication, was--(i) incapable of knowing the nature of the act; or (ii) that he was doing what was either wrong or contrary to law; and (iii) that the thing which intoxicated him was administered to him without his knowledge or against his will.

Voluntary drunkenness is no excuse for the commission of a crime. But if a man is made drunk through stratagem or the fraud of others, or through ignorance, or through any other means against his will, he is excused.

Section 86 of the Code further says that a person voluntarily drunk will be deemed to have the same knowledge and liable for the consequences as he would have had if he had not been intoxicated. The section attributes to a drunken man the knowledge of a sober man when judging of his action, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

(b) The defence is not tenable, because, as stated above, voluntary drunkenness is no excuse for the commission of an offence. In the given case, the drunkenness is to be deemed to be voluntary unless it is shown or proved otherwise.

Q. 35. Define Consent. State how far consent can be pleaded as a justification for committing a crime? Illustrate your answer.

Ans. CONSENT : Story defines consent as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. Section 90 of the Pakistan Penal Code defines consent in a negative form. It in effect, says that a consent is not a true consent if it is given:--

- (i) by a person under fear of injury, or
- (ii) under a misconception of the fact and the person obtaining the consent knows or has reason to believe that the consent was given in consequence of such fear or misconception.
- (iii) if the consent is given by a person of unsound mind ;
- (iv) under intoxication, or
- (v) under twelve years of age, and who is unable to understand the nature and consequence of that to which he gives his consent.

ACT DONE BY CONSENT : Sections 87 to 89 and 91 of the Pakistan Penal Code deal with cases where consent is a justification for committing a crime. In the first place, Section 87 lays down that a person who causes injury to another person above eighteen years of age, who has given his consent to suffer the harm by doing an act which is not known by the doer to be likely to cause death or grievous hurt, does not commit an offence. A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such fencing, may be caused without foul play ; and if A, while playing fairly, hurts Z, A commits no offence. The principle of this section is based upon the maxim *volenti non fit injuria*, i.e., that to which a man consents cannot be considered an injury, for every person is the best judge of his own interest and no man will consent to what he thinks harmful to himself.

In the second place, Section 88 lays down that nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm. A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence. Persons not qualified as medical practitioners cannot, however, claim the benefit of this section as they can hardly satisfy a Court that they had undertaken the operation in good faith as defined in Section 52, for good faith means a conscientious belief that they had skill to perform the operation, while the supposition is that they were unskilled and ignorant.

In the third place, Section 89 empowers the guardian of an infant under twelve years or of an insane person to consent to inflict harm on the infant or the insane person, provided it is done in good faith and is done for his benefit. No consent, however, can justify intentional causing of death. A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is protected by the provisions of this section, inasmuch as his object was the cure of the child.

In the fourth place, Section 91 does not extend the protection to offences which are offences independently of any harm which they cause, or be intended to cause, or be known likely to cause, to the person giving the consent, or on whose behalf the consent is given. To illustrate, causing miscarriage is an offence (unless it be caused in good faith for the purpose of saving the life of the woman) independently of any harm which it may cause or be intended to cause to the woman. Therefore, it is not an offence "by reason of such harm," and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

Q. 36. In what cases will a plea of compulsion or necessity be a sufficient defence against a charge of criminal offence?

Ans. PLEA OF COMPULSION OR NECESSITY : The excuse of necessity or compulsion as a defence for an act cannot be pleaded except as provided in Section 94 of the Pakistan Penal Code. That section lays down that except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not, of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint. This section will not, however, save a person who, of his own accord or by reason of a threat of being beaten, joins a gang of dacoits. But if he is seized by a gang of dacoits and forced by threat of instant death to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it under pain of instant death, will be entitled to the benefit of this section.

It is thus clear from the above that a person is excused from the consequences of any act, except murder and offences against the State punishable with death, done under fear of instant death ; but fear of hurt or even of grievous hurt is not a sufficient justification. It has been held that the accused was not entitled to the protection of Section 94 of the Code in the case where the threat of instant death was present at the beginning or even some time afterwards but did not continue till the end of the commission of an offence. There must be the apprehension of force upon the person and fear of death, and this force and fear must continue to be present at the time of the act.

Q. 37. What is the right of private defence ? State the law with regard to the right of private defence of the body.

A, B and C, who were armed, were escorting some ladies out of a village at the request of the ladies. X, Y and Z attempted to kidnap the ladies. While doing so, X levelled a loaded gun against A but was stabbed to death by B. Has B committed any offence ? Give reasons.

Ans. RIGHT OF PRIVATE DEFENCE : Subject to certain limitations the law gives a right to every person to defend his body or property, or the body or property of another person against unlawful aggression. He may protect his right by his own force or prevent it from being violated. It is a right inherent in a man. But the kind and amount of force is minutely regulated by law. This use of force to protect one's property and person is called the right of private defence.

RIGHT OF PRIVATE DEFENCE OF BODY : Section 97 lays down that every person has a right, subject to the restrictions contained in Section 99, to defend his own body and the body of any other person, against any offence affecting the human body. Section 102 of the Code provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it commences as long as such apprehension of danger to the body continues. It is clear from the wording of the section that the right commences and continues as long as danger to body lasts. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger. There must be an attempt or threat, and consequent thereon an apprehension of danger, but it should not be a mere idle threat. There must be a reasonable ground for the apprehension.

The right of private defence of the body extends to the voluntary causing of death or of any other harm to the assailant if the offence occasioning the exercise of the right be of any of the following descriptions. *viz.*, (i) an assault causing reasonable apprehension of death--even injury to innocent persons in the right of private defence against an assault is excusable, (ii) assault causing reasonable apprehension of grievous hurt; (iii) assault with the intention of committing rape, gratifying unnatural lust, kidnapping or abducting or wrongfully confining a person causing reasonable apprehension that he will not be able to have recourse to the public authorities for his release.

For the purpose of exercising the right of private defence physical or mental incapacity of the person against whom the right is exercised is no bar.

There is, however, no right of private defence (i) against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant or by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law; (ii) in cases in which there is time to have recourse to the protection of the public authorities; (iii) nor does the right of private defence extend to the inflicting of more harm than it is necessary to inflict for the purpose of defence. (S. 99).

The measure of defence must bear proportion to the quantum of force used by the attacker and which it is necessary to repel. Thus where the accused who was attacked by another with a *Kirpan* succeeded in disarming his opponent by taking away his weapon and showered blows after blows including the serious ones on the chest, it was held that he must be held to have exceeded the right of self-defence and was guilty under Section 304, Part I, P.P.C.

An act done in exercise of the right of private defence is not an offence and does not, therefore, give rise to any right of private defence in return.

The right is not available in respect of anticipated action. Defensive action is justified only when positive overt act of damage or harm is set in motion.

The law does not confer a right of self-defence on a man who goes and seeks an attack on himself by his own threatened attack on another--an attack which was likely to end in the death of the other. The right of self-defence conferred by the law or preserved by the law for an individual is a very narrow and circumscribed right and can be taken advantage of only when the circumstances fully justify the exercise of such a right.

B has committed no offence for the reasons given above, namely *X* was killed in attempting to kidnap the ladies. *B* thus did not exceed the right of private defence.

CHAPTER V

OF ABETMENT

(Sections 107-120)

Q. 38 What is Abetment and what are its different forms ?

Ans. ABETMENT : Abetment is defined in Section 107 thus:

"A person abets the doing of a thing who:

Firstly : instigates any person to do that thing ; or

Secondly : engages with one or more other person or persons in any conspiracy for the doing of that thing ; if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly : intentionally aids, by any act or illegal omission, the doing of that thing."

So according to above definition abetment may be constituted:

1. ABETMENT BY INSTIGATION : In common language it means to goad or urge forward or to provoke, incite, urge or encourage in doing something. It is equivalent to words--**counselling**, **procuring** or **commanding** of English law. Explanation 1 to Section 107 of the Code explains the term instigation. According to it, "if a person legally bound to disclose a material fact wilfully or by wilful misrepresentation conceals it and voluntarily causes or procures or attempts to cause or procure a thing to be done, he will be said to instigate the 'doing of that thing'". Illustration given in the Code is that A with a warrant from Court is to apprehend B. C wilfully representing to A that D is B and caused his apprehension. Here C abets by instigation the apprehension of D.

2. ABETMENT BY CONSPIRACY : An agreement between two or more persons to do an illegal act, or to do a legal act by illegal means, is called criminal conspiracy. So if a person engages with one or more other person or persons in any conspiracy for the doing of a thing and some act or illegal omission takes place in pursuance thereof, he can be punished not only as instigator but also as conspirator. Conspiracy can only amount to abetment if an act or illegal omission takes place in pursuance of the conspiracy.

3. ABETMENT BY INTENTIONAL AIDING : If a person intends to facilitate the commission of the offence, he will be said to abet by aiding. Merely to give the aid does not amount to abetment. According to Explanation 2 to Section 107 a person is said to aid the

doing of a thing if either prior to or at the time of the commission of an act, he does anything in order to facilitate the commission of that act, and thereby facilitates commission thereof. Aid may be given by act or by illegal omission. If a servant keeps open the gate of his master's house to facilitate entry of the thieves, he is not guilty. But if he informs this act to thieves, he will be guilty.

A instigates B to commit suicide and C puts poisonous drink in B's hand. Here A and C both are abettors--A by instigation and C by intentional aiding. Similarly A will be held guilty as abettor by intentional aiding if he provides B with a room for committing adultery or rape.

Q. 39. Who is an abettor?

B and G, a boy and a girl, are friends. Both of them believe that G is quick with child, but in fact she is not quick with child. B instigates G to commit abortion. In consequence of this instigation G takes drugs which in ordinary course would have caused an abortion. What offence, if any, has been committed by B and by G ?

Ans. ABETTOR : The act may be done by the hands of one person while another is present, or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person ; and besides those participators, there may be other persons who contribute less directly to the commission of the offence by advice, persuasion, incitement or aid.

Whether or not accused is guilty of abetment depend upon whether he intentionally aided the other accused in preparation of the crime.

Section 108 defines an abettor as a person who abets commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1 : The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2 : To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused. A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder. Again, A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3 : It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge. A with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is, therefore, subject to the punishment of death.

Explanation 4 : The abetment of an offence being an offence, the abetment of such an abetment is also an offence. A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5 : It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should commit the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. A conspires with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C had not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has, therefore, committed the offence defined in this section, and is liable to the punishment for murder.

B is guilty of abetting the offence of attempt to cause miscarriage. Causing miscarriage is punishable under Section 312, P.P.C., as an offence. Under Section 511, P.P.C., all attempts to commit offences are punishable in the same manner as the substantive offence itself. B instigated G to cause miscarriage. It is not necessary in an attempt to commit the offence that the completed offence should have resulted. As the illustration to Section 511, P.P.C. will show where an attempt is made to commit an offence, even if it does not succeed due to reasons beyond the offender's control and volition it is punishable. Thus for example if A puts his hands in B's pocket intending to pick it, he is guilty even if the pocket happens to be empty. In the problem before us the drugs taken by G at the instigation of B were capable of causing miscarriage, and were administered with that intention. The fact

that no miscarriage resulted was independent of *B* or *G*'s volition as *G* was not in fact quick with child. *B* should be held guilty of the offence under Section 312, P.P.C., read with Section 511, P.P.C.

G is guilty of attempting to cause her own miscarriage because she took the drugs which in ordinary course would have caused an abortion and thus caused herself to miscarry. Here case is entirely covered by explanation of Section 312, P.P.C. Section 312, P.P.C., deals with the causing of miscarriage with the woman's consent ; Section 313, P.P.C., deals with the causing of miscarriage without the woman's consent. In the problem in hand it is Section 312, P.P.C., that will apply.

A person is liable for the act done, in the same manner and to the same extent as if he had directly abetted it, provided that the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

A instigates a child to put poison into the food of *Z*, and gives him poison for that purpose. The child : in consequence of the instigation, by mistake puts the poison into the food of *Y*, which is by the side of that of *Z*. Here, if the child was acting under the influence of *A*'s instigation, and the act done was under the circumstances a probable consequence of the abetment, *A* is liable in the same manner and to the same extent.

Q. 40. State under what circumstances an abettor may be punished for an offence different from that which was abetted. Illustrate your answer?

Ans. Under Section 111 an abettor may be liable for the commission of a different act than the one he instigated, provided the different act was a probable consequence of the abetment and was committed under the influence of the instigation. A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such act ; an unusual or unexpected consequence cannot be described as a probable one. When the act done is different from the act instigated, an abettor is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation. An unusual or unexpected consequence cannot be described as a probable one.

Section 113 further lays down that if a different effect is caused by the act abetted than that intended by the abettor, the abettor is liable for the effect so caused, provided he knew that it was likely to cause that effect.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the imprisonment provided for murder.

Q. 41. Distinguish between Abetment and attempt?

Ans. ABETMENT AND ATTEMPT : Although both are indictable offences they differ in certain respects. In the first place, in abetment the offence is complete in itself within the meaning of Section 40, P.P.C., while an attempt to commit the offence is not completed. If the act is completed there would no more be an attempt but the offence itself. It is only when the object to commit an offence fails that the accused is guilty of attempt to commit that offence. In the second place, abetment may be committed in several ways mentioned in Section 107, viz., instigating any person, engaging with one or more other person or persons in any conspiracy for the doing of a thing, or intentionally aiding, by any act or illegal omission, the doing of that thing. An attempt is, however, committed by doing any act towards the commission of the offence. In the third place in abetment the abettor need not be present at the time of the commission of the offence, but in an attempt the presence of the offender is necessary at the time of the **commission** of the offence. In the fourth place, abetment of an offence is more severely punished than attempt to commit the same offence.

CHAPTER VI

CRIMINAL CONSPIRACY

(Sections 120-A and 120-B)

Q. 42. Explain the offence of Criminal conspiracy. How is it punishable ? Distinguish between abetment and conspiracy.

Ans. CRIMINAL CONSPIRACY : Conspiracy differs from other offences in this respect that in other offences the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or the attempting to do some act to carry out the intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not.

When two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal means, such an agreement is designated a criminal conspiracy : Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation : It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. (S. 120-A).

The ingredients of the offence of criminal conspiracy are : (1) that there must be an agreement between the persons who are alleged to conspire; (2) that the agreement should be (a) for doing an illegal act, or (b) for doing by illegal means an act which may not itself be illegal; and (3) in the case of a conspiracy other than a conspiracy to commit an offence there must be an overt act done by one or more of the parties to the conspiracy to effect the object thereof. A distinction is drawn between an agreement to commit an offence and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there must be some act done by one or more of the parties to the agreement to effect the object thereof, i.e., there must be an overt act.

PUNISHMENT FOR CRIMINAL CONSPIRACY : As regards punishment Section 120-B provides that one who is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where there is no provision for the punishment of such a conspiracy, be punished as an abettor of such offence ; in other cases he shall be liable to a punishment that may extend to six months, or with fine or with both.

DIFFERENCE : As regards the difference between abetment and conspiracy the former is the wider of the two ; in point of fact it is a genus of which the offence of conspiracy is a species. Abetment may be committed in various ways enumerated in Sections 107 and 108 and conspiracy is one of them. In the next place abetment *per se* is not a substantive offence, while criminal conspiracy is a substantive offence by itself and is punishable as such.

CHAPTER VII

OF OFFENCES AGAINST STATE

(Sections 121-130)

Q. 43. Classify the offences against the State?

Ans. OFFENCES AGAINST THE STATE : The offences against the State may be classified as under :

- (1) Waging, or attempting or conspiring to wage or collecting men and ammunition to wage war against the Government of Pakistan (Sections 121, 121-A, 122 and 123).
- (2) Assaulting President, or Governor any province with intent to compel or restrain the exercise of any lawful powers (S. 124) ;
- (3) Sedition (S. 124-A);
- (4) War against the Government of any Asiatic power at peace with Pakistan or committing depredations on the territories of such power (Ss. 123-126) ;
- (5) Permitting or aiding or negligently suffering the escape of, or rescuing or harbouring, a State prisoner. (Ss. 128-130).

Q. 44. What is necessary to constitute the offence of waging or attempting to wage war against the Government of Pakistan ? How is it punishable ?

Ans. INGREDIENTS OF THE OFFENCE OF WAGING WAR AGAINST GOVERNMENT : The waging of war is the attempt to accomplish by violence any purpose of a public nature. When a multitude of persons rise and assemble to attain by force and violence any object of a general public nature, it amounts to waging war against the Government. It is not the number of the force, but the purpose and intention, that constitutes the offence and distinguishes it from riot or any other rising for a private purpose.

In order to constitute an offence of waging or attempting to wage war under Section 121 of the Pakistan Penal Code it is necessary to show that (a) the accused waged war, attempted to wage such war or abetted the waging of such war, and (b) that such war was against the Government of Pakistan. Thus if A joins an insurrection against the Government of Pakistan, he has committed the offence of waging war.

The above offence is punishable with death, or imprisonment for life, and also fine.

Q. 45. Explain the Law of Sedition.

Ans. LAW OF SEDITION : Sedition consists in exciting or attempting to excite in others certain bad feelings towards the Government. Section 124-A of the Pakistan Penal Code embodies the law of sedition. It reads : "Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Central or Provincial Government established by law in Pakistan, shall be punished with imprisonment for the life, or any shorter term to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

Explanation 1 : The expression 'disaffection' includes disloyalty and all feelings of enmity.

Explanation 2 : Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

Explanation 3 : Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

Ingredients : The essential ingredients of the section are : (1) bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite disaffection towards the Federal or Provincial Government ; and (2) such act or attempt may be done (i) by words, either spoken or written, or (ii) by signs, or (iii) by visible representation.

The essence of the crime of sedition consists in the intention with which the language is used. The intention of a speaker, writer or publisher, may be inferred from the particular speech, article, or letter. The requisite intention cannot be attributed to a person if he was not aware of the contents of the seditious publication. It is not necessary that the acts or words complained of must either incite to disorder, or must be such as to satisfy reasonable men that is their intention 'or tendency. Mere existence of feeling of hatred is not punishable unless an attempt is made to excite such feelings in others and the hatred and contempt must be hatred and contempt of the State, or of the established Government.

It is not every kind of disaffection, hatred or contempt which would constitute seditions. It is that degree of disaffection, hatred or contempt which induces people, to refuse to recognize the Government at all and leads them to un-constitutional methods

which is essential before a charge of sedition can be held to be established. The writing or representation has to be read as a whole and in a fair, free and liberal spirit.

Bringing Government into hatred or contempt by publication of seditious material under pretence of freedom of Press not protected. Representation of true or historical facts leading to creation of hatred or contempt is covered by the section.

Needless to say that circumstances and environments have changed since the incorporation of Section 124-A in the Penal Code and they are changing fast. In modern times the State is conceived as an instrument for the advancement of the well-being of the people and Government is the vehicle through which the State carries its beneficial activities. If a Government for the time being holding the reins, fails to respond effectively to the needs and aspirations of the people, it must be prepared for onslaughts by the people through their representatives. The notion of sedition has changed with the passage of time and in applying the Law of sedition as embodied in Section 124-A of the Penal Code.

CHAPTER VIII

OF OFFENCES RELATING TO ARMY, NAVY & AIR FORCE

(Sections 131-140)

Being Immaterial therefore Omitted.

CHAPTER IX

OF OFFENCES AGAINST PUBLIC TRANQUILITY

(Sections 141-160)

Q. 46. Define an "Unlawful assembly." When does it amount to riot?

Ans. UNLAWFUL ASSEMBLY : An assembly of five or more persons is designated an unlawful assembly, if the common object of the persons composing that assembly is:--

- (1) To overawe by criminal force, or show of criminal force, (a) the Federal or (b) any Provincial Government or (c) Legislature, or (d) any public servant in the exercise of the lawful power of such public servant ; or
- (2) To resist the execution of any law, or of any legal process ; or
- (3) To commit any mischief or criminal trespass, or other offences ; or
- (4) By means of criminal force, to any person (a) to take or obtain possession of any property, or (b) to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or (c) to enforce any right or supposed right ; or
- (5) By means of criminal force, or show of criminal force, (a) to compel any person to do what he is not legally bound to do, or (b) to omit to do what he is legally entitled to do.

Explanation : An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly. (S. 141).

It will be seen from the above that there must be more than four persons having the common object before the constructive guilt

under Section 142 can arise. The essence of the offence is the common object of the persons forming the assembly. Thus it has been held that where two of the five persons convicted had no common intention with the remaining three the conviction as against the rest cannot stand as there must be five or more persons with the common object to form an unlawful assembly.

Section 146 lays down that whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. The essential ingredients that constitute the offence of rioting are:--

- (1) that the accused persons being five or more in number formed an unlawful assembly ;
- (2) that they were animated by a common object ;
- (3) that force or violence was used by the unlawful assembly or any member of it ; and
- (4) that such force was used in prosecution of the common object.

Q. 47. Distinguish between (1) Riot and Unlawful assembly; and (2) Riot and Waging war?

Ans. (1) RIOT AND UNLAWFUL ASSEMBLY : A riot is an unlawful assembly in a particular state of activity, which activity is accompanied by the use of force or violence. It is only the use of force that distinguishes rioting from an unlawful assembly. Two things are, therefore, necessary to convert an unlawful assembly into a riot, viz., (a) the use of force or violence by an unlawful assembly or any member thereof and (b) such force or violence being used in prosecution of the common object of such assembly.

(2) RIOT AND WAGING WAR : (1) Riot is an offence which falls under offences against public tranquility, while waging war is an offence against the State. (2) Riot is not such a serious offence as waging war and consequently the latter is more severely punished. (3) A riot is always for a private purpose, but the object of waging war is a general nature.

Q. 48. Briefly explain the liability for constructive criminality as provided in Section 149 of the Pakistan Penal Code and compare it with the provisions of Section 34 of the Pakistan Penal Code.

Distinguish between common intention and common object as embodied in Sections 34 and 149 of the Penal Code.

Ans. LIABILITY FOR CONSTRUCTIVE CRIMINALITY : Section 149 of the Code lays down that if an offence is committed by any member of an unlawful assembly in

prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. The ingredients of this section are the commission of an offence by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly, or must be such as the members of the assembly knew to be likely to be committed.

The object of the section is that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. It is clear that persons not sharing the common object cannot be liable constructively. Thus a member of an unlawful assembly retiring from the assembly and taking no further part cannot be liable for subsequent murder committed by the assembly.

DISTINCTION BETWEEN COMMON INTENTION AND COMMON OBJECT: In order to understand the difference between the provisions of Sections 34 and 149 or between common intention and common object, the students are advised to refer to the provisions of Section 34 relating to common intention which has been discussed in detail in Chapter II.

Both the sections deal with liability for constructive criminality, i.e., liability for an offence not committed by the person charged. Section 149 deals with joint liability on common object, while Section 34 deals with joint liability on common intention. Section 149 is thus wider than Section 34. Section 34 does not lay down any limit to the number of persons combining, but Section 149 fixes a minimum of five to form an unlawful assembly.

Section 149 creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, namely, one of those named in Section 141 (unlawful assembly) and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing off the offence. Both sections deal with combination of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but Section 149 cannot at any rate relegate Section

34 to the position of dealing only with joint action by the commission of identically similar criminal acts. Section 34 refers to cases in which several persons both intend to do and do an act; it does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases Section 149 may be applicable but Section 34 is not. On the other hand, if several persons numbering five or more, both do an act and intend to do it, both Section 34 and Section 149 may apply. The basis of constructive guilt under Section 149 is mere membership of an unlawful assembly; the basis under Section 34 is participation in some action with the common intention of committing a crime. In a case to which Section 149 does not apply, all the accused persons can be found guilty of the offence constructively under Section 34 only on a finding that each of them took some part or other-in or towards the commission of the offence. Thus there is a clear distinction between Section 34 and Section 149.

Q. 49. Can a member of unlawful assembly be punished for every offence which is committed by one of its members ?

Ans. In cases where offences are committed by a single member of the assembly and in cases where offences are committed by two or more members of the assembly acting in furtherance of a common intention. If an offence is committed, whether by a single member of the assembly or by a group of members, the other members of the assembly may be liable under this section. *M* and his party were ploughing certain disputed land when the members of the complainant's party came up to interfere with them and to turn them out. The Sessions Judge found that the latter were not justified in forcibly preventing the ploughing of *M*'s party and that on the other hand *M* was not justified in striking *B* (one of the complainants party) on the head and thereby causing his death. It was held that as the members of the deceased's party were the aggressors, their object having been to dispossess the other party from the land. *M*'s party were perfectly justified in exercising their right of private defence, and if *M* exceeded that right, he, and he alone, was guilty of the offence and this section did not operate to make *M*'s companions equally guilty with him, as they were not at the time members of an unlawful assembly.

Q. 50. What is an Affray ? Distinguish between (a) Rioting and affray, and (b) Affray and assault.

Ans. AFFRAY : When two or more persons, by fighting in a public place, disturb the public peace, they are said to commit an affray. (S. 159). The ingredients of the section are first a fight between two or more persons, *secondly* such fight must be in a

public place and lastly the fight must disturb the public peace. Mere abusing or quarrelling without exchanging blows will not make this section applicable. It contemplates a definite breach of peace or an assault.

(a) **RIOTING AND AFFRAY** : Riot is the use of force or violence used by an unlawful assembly (which is an assembly of five or more persons) or by any member thereof in prosecution of the common object of that assembly. An affray, on the other hand, is committed by two or more persons by fighting in a public place when they disturb the public peace. In the case of affray there may thus not be the common object to disturb public peace. To sum up, a riot differs from an affray inasmuch as (1) a riot can be committed only by five or more persons, while an affray can be committed by two or more persons.

(2) A riot can be committed even in a private place, but an affray cannot be committed in a private place.

(3) In a riot every member of the unlawful assembly is punishable, although some of them may not have personally used force or violence; this is not so in the case of an affray because only those actually engaged are liable.

(4) The punishment awarded in the case of riot is imprisonment for two years, or with fine, or with both, but in the case of an affray it is one month or with fine up to Rs. 100 or with both.

(b) **AFFRAY AND ASSAULT** : (1) An affray must be committed in a public place, but an assault may be committed either in a public or a private place.

(2) An affray is committed by two or more persons, while an assault is made by the making of any gesture or preparation by a person to cause another person present to apprehend that the person making it is about to use criminal force to him.

(3) An affray is an offence against public tranquility, while an assault is an offence against the person of an individual.

(4) The punishment provided for affray is imprisonment for one month or with fine up to Rs. 100, or both, while it is three months or with fine up to Rs. 500, or with both in the case of an assault.

"An affray is nothing more than an assault committed in a public place and in a conspicuous manner, and is so called because it affrighteth and maketh men afraid."

Q. 51. How far and under what circumstances is one person liable for the acts of others ?

Ans. LIABILITY FOR ACTS OF OTHERS : A person is liable to be convicted for offences committed by others in the following circumstances:--

(1) When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. (S. 34)

(2) When a person abets the commission of an offence and the offence abetted is committed, if no express provision is made for the punishment of such abetment, he shall be punished with the punishment provided for the offence. But if a different offence is committed, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it, provided the act done was a probable consequence of the abetment. (Ss. 109 and 111).

(3) Whenever force or violence is used by an unlawful assembly, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. (S. 146)

(4) If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person, who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. (S. 149).

(5) If the owner or occupier of the land upon which an unlawful assembly or riot has taken place does not give earliest notice thereof to the officer-in-charge of the nearest police station he is liable to punishment. (S. 154).

CHAPTER X

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS

(Sections 161-171)

Q. 52. Explain briefly and illustrate the law dealing with the acceptance of illegal gratification by public servants as laid down in the Pakistan Penal Code.

Ans. ACCEPTANCE OF ILLEGAL GRATIFICATION BY A PUBLIC SERVANT : Section 161, which embodies the law relating to illegal gratification, lays down that whoever, being or expecting to be a public servant, accept or obtains or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Federal or any Provincial Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

INGREDIENTS : The ingredients of the offence are: (1) that the accused when the offence was committed was, or expected to be, a public servant; (2) that he accepted, obtained, agreed to accept, or attempted to obtain from some person a gratification whether for himself or any other person; (3) that such gratification was not a legal gratification due to him; (4) that the gratification was accepted by him as a motive or reward--(a) for doing, or forbearing to do an official act, or (b) for showing, or forbearing to show, favour or disfavour in the exercise of his official function, or (c) for rendering or attempting to render any service or disservice to some one with the Federal or Provincial Government or the Legislature, or with any public servant.

A, a Munsif, obtains from Z, a banker, a situation in Z's bank for A's brother as a reward to A for deciding a cause in favour of Z. A has committed the offence defined in this section. Again A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained to title for Z, and thus induces Z to give a money as a reward for this service. A has committed the offence defined in this section.

To constitute an offence under Section 161 it is not necessary that the public servant who receives the bribe must, in fact, be in a position to do the act, favour or service at the time. Payment of

money to an officer as donation to a public institution in which the officer is interested would amount to illegal gratification within Section 161 only if the payment was made either as a motive for the officer showing a favour to the accused or as a reward for having already shown the favour. Again, for a public servant to be guilty under Section 161 it is not necessary that he should accept gratification for himself. It does not matter if he accepts gratification for "any other person".

CHAPTER XI

OF CONTEMPTS OF LAWFUL AUTHORITY OF PUBLIC SERVANTS

(Sections 172-190)

Q. 53. State briefly the various provisions in the Penal Code intended to enforce obedience to the lawful authority of public servants?

Ans. PROVISIONS REGARDING ENFORCING OBEDIENCE TO LAWFUL AUTHORITY : The various provisions in the Pakistan Penal Code intended for enforcing obedience to the lawful authority of public servants are as under:-

- (1) Absconding to avoid service of summons, notice or order proceeding from any public servant--one month's simple imprisonment or with fine extending to Rs. 500 or both. (S. 172).
- (2) If the summons or notice or order is to attend in person or to produce a document in a Court--simple imprisonment for six months, or with fine extending to Rs. 1,000, or with both. (S. 172).
- (3) Preventing service of summons or other proceeding or removing the same from any place or preventing the proclamation--one month's simple imprisonment or with fine up to Rs. 500 or with both, or if the summons, notice, order or proclamation is to attend or produce a document in a Court--six month's simple imprisonment with fine up to Rs. 1,000, or with both. (S. 173).
- (4) Non-attendance in obedience to a summons, notice, order, etc., or departing before it is lawful to do so--one month's simple imprisonment and fine. A conviction under this provision is only possible when the person was legally bound to attend, but refused or intentionally omitted to attend. (S. 174).
- (5) Intentional omission (a) to produce or deliver a document to a public servant by a person legally bound to do so, (b) to give or furnish any notice or information to a public servant and (c) to assist a public servant when bound by law to give assistance--one month's simple imprisonment and/or fine, and where the document is to be produced or delivered to a Court, or where assistance is demanded for executing any process issued by a Court--six month's simple imprisonment and/or fine. (Ss. 175-176).

Q. 54. What are the offences which may be committed by giving false information and how are they punished ?

Ans. FALSE INFORMATION : Offences with regard to giving false information are contained in Sections 177, 181 and 182 of the Pakistan Penal Code.

Section 177 relates to furnishing of information on any subject to any public servant by a person legally bound to furnish it as true, which he knows to be false. It is punishable with simple imprisonment extending to six months or with fine or with both. And if the information which he is legally bound to give is in respect of the commission of an offence or for the purpose of preventing it or for the apprehension of an offender, the imprisonment may extend to two years.

Section 181 relates to a false statement on oath or affirmation to a public servant. The punishment provided is three years with or without fine.

Section 182 relates to false information by a person with intent to cause such public servant--

- (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts were known by him, or
- (b) to use the lawful power of such public servant to the injury or annoyance of any person.

PUNISHMENT : The punishment provided is six months or with fine extending to Rs. 1,000 or with both.

CHAPTER XII

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE

(Sections 191-229)

Q. 55. What are the essential ingredients of the offence of perjury? Or, when is a person said to give false evidence? Illustrate. Is there any difference between Pakistan and English Law on the point ?

Ans. OFFENCE OF PERJURY : Section 191 lays down that whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

The ingredients of the offence of giving false evidence are:--

- (1) a person must be legally bound--
 - (a) by an oath, or any express provision of law, to state the truth, or
 - (b) to make a declaration upon any subject;
- (2) he must make a false statement ;
- (3) he must know or believe it to be false ; or
- (4) not believe it to be true.

A few illustrations will make the point amply clear : (a) A, in support of a just claim which B has against Z for a sum of money, falsely swears, on a trial, that he heard Z admit the justice of B's claim. A has given false evidence. (b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and, therefore, gives false evidence. But if A in good faith believed the signature to be that of Z, which turns out to be wrong, A is not guilty of giving false evidence for here A's statement is merely as to his belief, and is true as to his belief. (c) A an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document, which he is bound by oath, to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence. (d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence whether Z was at that place on the day named or not.

The offence of giving false evidence is termed as perjury in English law. The English law differs from Pakistani law in respect of giving false evidence in the following respects : --

- (1) The English law requires that the false statement must have reference to some judicial proceedings and the false evidence given before a competent tribunal. This is not so in the Pakistani law, and the distinction only exists in reference to the degree of punishment imposed.
- (2) Under the English law perjury must be proved by two witnesses, or by one witness with proof or other material and relevant facts confirming his testimony. No particular number of witnesses is needed under the Code.
- (3) Under the English law the matter sworn to must be material to the cause pending in the Court. But according to the Code it is not necessary that the statement should be material.
- (4) An oath, or an affirmation rendered equivalent to it by law, is an essential element of the offence under the English law. In Pakistan an oath is merely one of the forms to bind a party to speak the truth. And even if an oath is improperly administered by an incompetent person, the offence would be committed if the party giving the false statement were bound by an express provision of law to state the truth.

Q. 56. (1) State the ingredients of the offence of fabricating false evidence by giving illustrations. (2) A, a police officer, made a false entry in the special diary relating to a case which was being investigated by him, but the document in which the alleged false entry was made was not one which was admissible in evidence. Can he, in the circumstances, be convicted for fabricating false evidence? (3) Distinguish between giving and fabricating false evidence?

Ans. (1) FABRICATING FALSE EVIDENCE : Section 192 lays down that whoever causes any circumstances to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who, in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

The essential ingredients of the section are:

- (1) Causing any circumstances to exist, or making (a) any false entry in book or record, or (b) making a document containing a false statement.
- (2) Doing one of the above acts with the intention that it may appear in evidence in (a) a judicial proceeding, or (b) a proceeding taken by law before a public servant or an arbitrator ;
- (3) Doing such act with the intention that it may cause any person, who in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion, and
- (4) The formation of opinion should be touching any point material to the result of such proceeding.

Illustrations : (i) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(ii) A makes a false entry in his shopbook for the purpose of using it as corroborative evidence in a Court of justice. A has fabricated false evidence.

(iii) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. A has fabricated false evidence.

(2) A IS NOT GUILTY OF FABRICATING FALSE EVIDENCE : To constitute the offence it is necessary that the false entry should have been made with the intention that it may appear in the judicial proceeding. The document was clearly inadmissible in evidence and hence no offence was committed.

(3) GIVING AND FABRICATING FALSE EVIDENCE : In the first place, although the intention forms the essence of the two offences of giving false evidence and fabricating the evidence, in the case of the former only the general intention is sufficient, but in the case of the latter particular intention is essential, viz., to cause a person in a proceeding to entertain an erroneous opinion by causing any circumstance to exist or making any false entry in a book or making any false statement. In the next place, in the case of giving false evidence the offence is committed by a person who is legally

bound by an oath to state the truth. This is not necessary in the case of fabricating false evidence. In the third place, the false statement need not be on any material point, but in the case of fabricating false evidence in order to make out the offence, it must be on a material point. In the fourth place, the effect of the evidence on the person who is to form an opinion upon the evidence in a proceeding is immaterial in false evidence, but it is very essential in the case of fabricating false evidence. And, lastly, there should be a proceeding being conducted in the case of false evidence, but such a proceeding need not be in existence in the case of fabricating false evidence : there need only be a prospect of such proceedings where the evidence so fabricated is intended to be used.

Q. 57. What is "Harbouring and offender"?

Ans. HARBOURING AN OFFENDER : The word "harbour", according to Section 52-A, includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means to evade apprehension.

The various provisions in the Penal Code relate to harbouring or concealing a person knowing him to be an offender with the intention of screening him from legal punishment, harbouring or concealing an offender having escaped from custody, or whose apprehension has been ordered, and knowingly harbouring any persons who are about to commit or have committed robbery or dacoity. The above provisions, however, do not extend to the case in which the harbour is given by the wife or husband of the person harboured. (Ss. 212, 216 and 216-A)

The above, however, presupposes that some offence has actually been committed and that the harbourer gives refuge to a person knowingly that thereby he helps to evade his apprehension or screens him from legal punishment. It does not apply to the harbouring of persons, not being criminals, who abscond to avoid or delay a judicial investigation.

Q. 58. Briefly state the provisions of the Pakistan Penal Code relating to attempt to escape from custody?

Ans. ATTEMPT TO ESCAPE FROM CUSTODY : The provisions relating to an attempt to escape from custody are contained in Sections 224, 225 and 225-B. They provide punishment (a) for a person resisting or obstructing the lawful apprehension of

himself for any offence with which he is charged or of which he has been convicted, or escaping or attempting to escape from legal custody--imprisonment up to two years, with the fine or both; (b) resisting or obstructing lawful apprehension of another person for an offence, or rescuing or attempting to rescue him from legal custody--punishment up to two years or with fine; but if the person to be apprehended is charged for an offence punishable (1) with imprisonment for life or imprisonment for ten years, or (2) with death, the sentence provided is up to three years or seven years respectively; and (c) resistance or obstruction to lawful apprehension or escape or rescue in cases not covered by the above two provisions--punishment up to six months or with fine.

CHAPTER XIII

OF OFFENCES RELATING TO RELIGION

(Sections 295-298-C)

Q. 59. What are the offences relating to religion?

Ans. OFFENCES RELATING TO RELIGION : They are provided in Sections 295 to 298, which are as follows:-

- (1) Injuring or defiling a place of worship, or any object held sacred by any class of persons, with intent to insult the religion of any class of persons (S. 295)--punishment up to 2 years and/or fine.
- (2) Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs (S. 295-A)--punishment up to 3 years and/or fine.
- (3) Voluntarily disturbing a religious assembly lawfully engaged in the performance of religious worship, or religious ceremonies (S. 296)--punishment one year and/or fine.
- (4) Trespassing in any place of worship, or burial place, offering any indignity to a human corpse, with intent to wound the feelings or religion of any person (S. 297)--punishment as in (3) above.
- (5) Uttering words or making signs with the intention of wounding the religious feelings of any person (S. 298)--punishment as in (3) above, using derogatory remarks in respect by holy passenger (S. 298-A)--punishment up to 3 years or fine or both.

CHAPTER XIV

OFFENCES AFFECTING HUMAN BODY

(Sections 299-338-H)

Q. 60. Define 'Daman'. How is it valued?

Ans. DAMAN. Daman has been defined in Section 299 (d), PPC. The word Daman is actually Dhman. It means compensation payable by the offender to the victim for causing hurt not liable to Arsh; as determined by Court. Daman is ordered for injuries where punishment of Arsh is not available. The value is not fixed or specified in the Ordinance. Its value will be determined in each case, by the Court keeping in view, firstly, expenses incurred on the treatment of victim ; secondly, loss or disability caused in

functioning or power of any organ ; and thirdly, for the anguish suffered by the victim. The Daman assessed by Court shall be payable to the victim or, if the victim dies, to his heirs according to their respective shares in the inheritance.

In cases of Qatl it will be proper, rather necessary, for prosecution to provide the Court with a list of wali, i.e., legal representatives of the deceased victim, as well as mention financial position of parties for determination of Diyat, Arsh or Daman. The Courts or criminal jurisdiction will not be required to undertake additional proceedings to determine dispute among the heirs. In the case of dispute, the compensation of any form may remain lying in Government treasury with direction to the heirs to have recourse to the Civil Courts. In hurt cases the compensation is to be received by the victim. There will be, therefore, no problem about its disbursement. If, however, the victim dies, then in the case of dispute his legal heirs may be asked to have recourse to the Civil Courts.

VALUE OF DAMAN : The value of Daman may be determined by the Court keeping in view--

- (a) The expenses incurred on the treatment of victim;
- (b) Loss or disability caused in the functioning or power of any organ; and
- (c) The compensation for the anguish suffered by the victim.

In case of non-payment of Daman, it shall be recovered from the convict and until Daman is paid in full to the extent of his liability, the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment or may be released on bail if he furnishes security equal to the amount of Daman to the satisfaction of Court.

Q. 61. Define Diyat. How value of Diyat is determined? To whom Diyat is disbursed ?

Ans. DIYAT : Clause (e) of Section 299, P.P.C. defines Diyat as "the compensation specified in Section 323 payable to the heirs of the victim by the offender".

In the definition the words "heirs of victim" have been used and not the words "the victim or his heirs." This means that Diyat is a compensation payable only in cases of Qatl, and not in cases of hurt. The offence of Qatl-i-Amd (intentional murder) if proved by evidence as provided in Article 17 of the Qanun-e-Shahadat, is punishable under Section 302, P.P.C. which does not provide for imposition of punishment of Diyat, compensation of fine. The punishment of Diyat is provided where an offender guilty of Qatl-i-Amd is not liable to Qisas or where an offender guilty of Qatl-i-Amd

is not liable to Qisas or where Qisas is not enforceable. The Court may, however in certain cases award punishment of imprisonment as Tazir in addition to Diyat. It may be stated that the consideration for compounding of Qisas or for compromise or waiver cannot be classed as Diyat. The said consideration is Badl-e-Sulh and is settled by the parties themselves subject to condition that Badle-e-Sulh shall not be less than the value of Diyat, which means minimum value assessed in substituted Section 323, P.P.C. The offender, in cases of Qatl-e-Shibh-i-Amd and Qatl-i-khata, shall be liable to be punished with Diyat in addition to imprisonment as Tazir, but in Qatl-bis-Sabab he shall be liable to Diyat only. It will be for the Court to fix value of Diyat in each case, keeping in view the financial position of parties and subject to injunctions of Islam. The minimum value of Diyat will, however an heir forgoes his share, the Diyat to the extent of his share shall not be recovered. The Court may order payment of Diyat in lump sum or in instalments spreading over three years from the date of judgment. The convict will not be required to suffer imprisonment in default of payment of Diyat of any part of thereof. If he fails to pay Diyat the convict shall be kept in jail to suffer simple imprisonment "until the Diyat is paid in full". The Court may, however, release the convict on bail if he is able to furnish security equivalent to the amount of Diyat to the satisfaction of Court for its payment. This means that the convict will be lodged in jail, till full Diyat is paid. The Court will not fix period of imprisonment in default thereof, it shall be recovered from his estate.

VALUE OF DIYAT : (1) The Court shall subject to the injunction of Islam as laid down in the Holy Qur'an and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of Diyat which shall not be less than the value of thirty thousand six hundred and thirty grams of silver.

(2) For the purpose of sub-section (1) the Federal Government shall, by notification in the official Gazette, declare the value of silver, on the first day of July each year or on such date as it may deem fit, which shall be the value payable during a financial year.

LIMIT OF DIYAT MONEY : The Diyat money has to be fixed keeping in view the financial position of the accused, but the same would not be less than Rs. 1,70,610 equivalent to 30.630 grams of silver.

SENTENCE : The accused had undergone the agony of protracted trial and had remained in custody for some days after conviction. The sentence of six month's R.I. awarded to the accused was reduced to term of imprisonment already undergone by them in circumstances.

COMPROMISE : The complainant who had been injured by the accused had compounded the offences of which the accused had been convicted. The compromise reached between the parties was voluntary and of their free will. The composition of the offences was permitted and the accused were acquitted in circumstances.

PAYMENT OF DIYAT : Payment of Diyat may be, in the following ways, made:-

- (1) The Diyat may be made payable in lump-sum or in instalments spread over a period of three years from the date of the final judgment.
- (2) Where a convict fails to pay diyat or any part thereof within the period specified in sub-section (1), the convict may be kept in jail and dealt within the same manner as if sentenced to simple imprisonment until the Diyat is paid full or may be released on bail if he furnishes security equivalent to the amount of Diyat to the satisfaction of the Court.
- (3) Where a convict dies before the payment of Diyat or any part thereof, it shall be recovered from his estate.

Q. 62. What are various kinds of Qatl ? What punishments are provided for each Qatl?

Ans. VARIOUS TYPES OF QATL : Following are the various kinds of Qatl:-

(1) CULPABLE HOMICIDE: Culpable homicide which amounts to murder i.e. Qatl-i-Amd is defined in substituted Section 300, P.P.C. This definition is similar to the definition of murder in the repealed Section 300, P.P.C. There is however, material difference in the punishment provided in two enactments. In original Section 302, P.P.C. the offender is liable to sentence of death or the imprisonment for life and fine. In the substituted Section 302 P.P.C. punishments provided are Qisas if proof under Article 17 of the Qanun-e-Shahadat is available or death or imprisonment for life as Tazir or with imprisonment of either description for a term which may extend to 25 years where the Qisas is not applicable according to injunctions of Islam. The sentence of fine has been eliminated. There should therefore, be no difficulty for Courts to administer justice in accordance with Islamic concept.

If Qatl-i-Amd is not liable to Qisas or it is not enforceable, the offender shall be liable to Diyat. The Court having regard to the facts and circumstances of the case, may in addition to Diyat, punish the offender with the imprisonment as Tazir under Section 308, P.P.C., which may extend to fourteen years. Similarly, even after waiver or compounding of right of Qisas in a Qatl-i-Amd the Court may in its discretion, having regard to facts and circumstances of the case punish, an offender, against whom right of Qisas has been waived or compounded with imprisonment as Tazir which may extend to 14 years. The idea behind this provision is the philosophy that there are two aspects of every crime. One relates to Haqooq Allah and the second relates to Haqooq-ul-Ibad. The wali may waive or compound Qisas but still it may be considered necessary to punish an offender keeping in view the nature of crime committed by him. For example an offender recklessly fires in street murdering and injuring some persons.

(2) CULPABLE HOMICIDE NOT AMOUNT TO MURDER : The culpable homicide which does not amount to murder i.e., Qatl-i-Amd is defined in substituted Sections, 315, 318 and 321, P.P.C. respectively as Qatl Shibh-i-Amid, Qatl-i-Khata and Qatl-bis-Sabab. These kinds of Qatl do not attract punishment of Qisas. These are punishable with imprisonment as Tazir and Diyat. These definitions do not provide specifically for situations contemplated by the exceptions of repealed Section 300, P.P.C. but are wide enough to include cases which used to be punished under Part Ist and Part IInd of repealed Section 304, P.P.C. and Section 304-A, P.P.C.

- (i) In Qatl-i-Shibh-i-Amd, the intention to cause harm to body is necessary. It means that whoever intentionally causes harm to the body or mind of any person which results in the death of that or any other person by an act or weapon which in the ordinary course of nature is not likely to cause death is said to commit Qatl-i-Shibh-i-Amd.
- (ii) In Qatl-i-Khata intention to cause death or harm is not required as used to be the case in Section 304 (ii) and Section 304-A, P.P.C. Two situations are contemplated in Qatl-i-Khata, one: That death is caused by mistake of act; two; that death is caused by mistake of fact, including rash or negligent act, and also rash and negligent driving. Qatl-i-Shibh-i-Amd and Qatl-i-Khata are liable to punishment of imprisonment and Diyat.
- (iii) The Qatl-bis-Sabab takes place without any intention to cause death of, or cause harm to, any person when the offender does any unlawful act which becomes a cause for the death of another person. This may be explained by the following illustration: --

A unlawfully digs a pit in the thoroughfare but without any intention to cause death of or harm to any person. B while passing through there falls in it and is killed. A has committed Qatl-bis Sabab.

The Qatl-bis-Sabab is punishable with Diyat only. In Qatl-bis Sabab, intention is missing. The essential ingredient is doing of an un-lawful act, resulting in un-intentional death, of or harm to any person.

Q. 63. Distinguish and define "Ikrah-e-Tam" and "Ikrah-e-Naqis" What punishment is provided for these offences ?

Ans. IKRAH-E-TAM : Ikrah-e-Tam means putting any person his spouse, or any of his blood relations with the prohibited degree of marriage in fear of instant death, or instant permanent impairing of any organ of body or instant fear of being subjected to sodomy or Zina-bil-jabr.

IKRAH-E-NAQIS : Ikrah-e-Naqis means any form of duress which does not amount to Ikrah-e-Tam. The two definitions read together are very wide. These do not state the reasons or object of duress. A Qatl committed in the circumstances of Ikrah-e-Tam or Ikrah-e-Naqis involves two persons. *Firstly*, the person who causes Ikrah-e-Tam or Ikrah-e-Naqis i.e., puts another person under duress, *secondly*, who is subjected to duress, i.e., Ikrah-e-Tam or Ikrah-e-Naqis. Both of them i.e., person committing Qatl under Ikrah-e-Tam and Ikrah-e-Naqis and the person causing Ikrah-e-Tam and Ikrah-e-Naqis seem to have been made liable to punishment under Section 302, P.P.C. The Court will, therefore, be under onerous duty to determine the precise nature of offence committed by each of them.

QATL COMMITTED UNDER IKRAH-E-TAM OR IKRAH-E-NAQIS: Whoever commits qatl,--

- (a) Under Ikrah-e-Tam shall be punished with imprisonment for a term which may extend to twenty five years but shall not be less than ten years and the person causing 'Ikrah-e-tam' shall be punished for the kind of Qatl committed as a consequence of his Ikrah-e-Tam ; or
- (b) Under 'Ikrah-e-Naqis' shall be punished for the kind of Qatl committed by him and the person causing 'Ikrah-e-Naqis' shall be punished with imprisonment for a term which may extend to ten years.

Accused admitting that he was a convict undergoing imprisonment for life. Counsel contending that this question could

not have been put to accused because no evidence to bring case u/s. 303, P.P.C. was led, High Court repelling contention for reasons. Firstly Section 342, Cr.P.C. deals with proof of ingredients of offences and not with question of sentence and enhanced sentence; hence it would not be necessary to wait for certain evidence before putting question about his earlier sentence to accused. Secondly Section 537, Cr.P.C. would not be available in a case of admission of fact by accused since it cannot be said that there could be any miscarriage of justice or that accused could suffer any prejudice. Thirdly Section 511, Cr.P.C. did not deal with any exclusive method of proof of earlier conviction, but methods provided there were in addition to ordinary methods provided by law for proof of fact. Held, there is sufficient evidence to bring his case within ambit of Section 303:

- (i) Conviction and sentence u/s. 303. Not warranted in absence of the proof of the essential ingredient of offence u/s. 303 that murder was committed while accuse was serving sentence of life imprisonment. Answers by accused to question in course of his examination u/s. 342, Cr.P.C. Cannot be used as evidence against him to fulfil requirements of Section 303.
- (ii) Conviction u/s. 303 awarded by Trial Court found by High Court unsustainable conviction altered to conviction u/s. 302 in view of overwhelming evidence produced by prosecution in support of murder charge. Held: As appellant had not caused fatal injury to deceased and had merely caught hold of him when he was stabbed by co-accused it would not be proper to award death sentence to appellant. Appellant sentenced to life imprisonment plus fine. High Court also maintaining appellants convictions and sentences u/ss. 332 and 353.

Conviction and death sentence awarded by Trial Court to appellant for double murder in jail premises where appellant and two deceased serving sentences of imprisonment. On appeal High Court finding that there being conflict between ocular evidence and medical evidence, ocular evidence was not liable and circumstantial evidence was not sufficient to support conviction. Appeal allowed and conviction and death sentence of appellant set aside

Q. 64. When in a case of Qatl-i-Amd an accused is not liable to Qisas and when punishment of Qisas cannot be enforced for Qatl-i-Amd?

Ans. QATL-I-AMD NOT LIABLE TO QISAS : Qatl-i-Amd shall not be liable to Qisas in the following cases, namely,---

- (a) when an offender is minor or insane:

Provided that, where a person liable to Qisas associates, with himself in the commission of the offence a person not liable to Qisas with the intention of saving himself from Qisas, he shall not be exempted from Qisas--

- (b) when an offender causes death of his child or grandchild, how lowsoever, and
- (c) when a Wali of the victim is a direct descendant, how lowsoever, of the offender. (S. 306).

Cases in which Qisas for Qatl-i-Amd shall not be enforced. Qisas for Qatl-i-Amd shall not be enforced in the following cases, namely--

- (a) when the offender dies before the enforcement of Qisas;
- (b) when any Wali voluntarily and without duress, to the satisfaction of the Court, waives the right of Qisas under Section 309 of compounds under Section 310, and
- (c) When the right of Qisas devolves on the offender as a result of the death of the Wali of the victim, or on the person who has no right of Qisas against the offender.

Illustrations

- (i) A kills Z. The maternal uncle of his son B. Z, has no other Wali except D, the wife of A. D. has the right of Qisas from A. But if D dies, the right of Qisas shall devolve on her son B who is also son of the offender A. B cannot claim Qisas against his father. Therefore, the Qisas cannot be enforced.
- (ii) B kills Z, the brother of her husband A. Z has no heir except A. Here A can claim Qisas from his wife B. But if A dies, the right of Qisas shall devolve on his son D who is also son of B. The Qisas cannot be enforced against B.

Q. 65. Discuss the law relating to waiver and compounding (SULH) of Qisas in Qatl-i-Amd?

Ans. Waiver-Afw of Qisas in Qatl-i-Amd; (1) In the case of Qatl-i-Amd, an adult sane wali may, at any time and without any compensation waives his right of Qisas:

Provided that the right of Qisas shall not be waived--

- (a) Where the Government is the Wali ; or
- (b) Where the right of Qisas vests in a minor or insane.

(2) Where a victim has more than one Wali any one of them may waive his right of Qisas:

Provided that the Wali who does not waive the right of Qisas shall be entitled to his share of Diyat.

(3) Where there are more than one offenders, the waiver of the right of Qisas by the Wali of one victim shall not affect the right of Qisas of the Wali of the other victim.

(4) Where there are more than one offenders, the waiver of the right of Qisas against one offender shall not affect the right of Qisas against the other offender.

WAIVER OF QISAS : A minor Wali cannot be compelled to waive the right of his Qisas through his guardian.

Right of waiver is a personal right and the same, therefore, cannot be exercised by the guardian.

WAIVER AND COMPOUNDING OF QISAS--
DIFFERENCE : Waiver (Afw) is completely different from compounding right of Qisas (Sulh); in the former the Wali waives the right of Qisas without any compensation while in the latter the right of Qisas is compounded on receipt of compensation (Badl-i-Sulh). Where the Government is a Wali or where right of Qisas vests in a minor or insane person no waiver (Afw) can be affected by the Government or the Wali of the minor or insane person, but they can compound right of Qisas.

COMPOUNDING OF QISAS (SULH) IN QATL-I-AMD :

(1) In the case of Qatl-i-Amd, an adult sane Wali may, at any time on accepting Badal-i-Sulh, compound his right of Qisas :

Provided that giving a female in marriage shall not be a valid Badl-i-Sulh.

(2) Where a Wali is a minor or an insane the Wali of such minor or insane Wali may compound the right of qisas on behalf of such minor or insane' Wali:

Provided that the value of Badl-i-Sulh not be less than the value of Diyat.

(3) Where the Badal-i-Sulh is not determined or is a property or a right the value of which cannot be determined in terms of money under Shari'ah the right of Qisas shall be deemed to have been compounded and the offender shall be liable to Diyat.

(4) Badl-i-Sulh may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the Wali.

EXPLANATION : In this section, Badl-i-Sulh means the mutually agreed compensation according to Shari'ah to be paid or given by the offender to a Wali in cash or in kind or in the form of movable or immovable property. (S. 310)

COMPOUNDING OF QISAS : Compounding of Qisas and compounding of offence are two separate terms. Compounding of offence is provided by Section 345; Cr.P.C. while compounding of Qisas is under Section 310. P.P.C.

According to the case of *Javaid Masih v. The State*, the compounding of Qisas (Sulh) in cases of Qatl-i-Amd is possible even in those cases where the right of Qisas cannot be enforced because the sentence of death has not been imposed and lesser sentence granted under Section 302, P.P.C. Since compounding right of Qisas can be effected by the Wali of the deceased, care has to be taken to ascertain his correct identity and also to see that interest of the minor, if involved, is not prejudiced.

COMPROMISE-BADL-I-SULH : The District Magistrate had reported that convict had been pardoned in lieu of marriage of his two daughters with the sons of the deceased and payment of rupees two lacs in cash as compensation.

Brother and two sons of the deceased had authenticated the correctness of the compromise before the District Magistrate and had also acknowledged the receipt of rupees two lacs as compensation from the accused party. State Counsel had urged nothing against the compromise. Compromise being genuine and requirements of law having been satisfied, the Supreme Court accepted the compromise and ordered acquittal of the accused.

Q. 66. Distinguish between "Itlaf-e-Udw" and Itlaf-e-Salahiyat-e-Udw?

Ans. ITLAF-E-UDW : Itlaf-e-Udw, whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause Itlaf-e-Udw. (Sect. 334).

PUNISHMENT FOR ITLAF-E-UDW : According to Section 334 whoever by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes Itlaf-e-Udw of any person, shall in consultation with the authorised medical officer, be punished with Qisas, and if the Qisas is not executable keeping in view the principles of equality in accordance with the Injunction of Islam, the offender shall be liable to Arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as Tazir.

ITLAF-E-SALAHYAT-E-UDW : According to Section 335 whoever destroys or permanently impairs the functioning power or capacity of an organ of the body of another person, or causes permanent disfigurement is said to cause Itlaf-e-Salahiyat-e-Udw.

Sentence, quantum of occurrence took place in the year 1980. Accused was thrice sent to jail during proceedings and suffered one hundred and twenty days in jail after conviction. Witness had himself invited trouble. Agony of protracted trial coupled with imprisonment already served by him would meet the ends of justice. Sentence was reduced to that already undergone in circumstances.

Voluntarily causing grievous hurt on provocation. Delay of three hours in lodging first information report not explained by prosecution. Occurrence taking place at dark night and prosecution witness identifying accused on his voice only. Enmity existing between parties. Statements of prosecution witness uncorroborated and no reliance could be placed on them. Complainant involved two more persons in first information report who were not challaned by police. Prosecution held, failed to establish case against accused beyond doubt. Conviction set aside.

APPRAISAL OF EVIDENCE : Evidence available on record supported the plea of sudden and grave provocation raised by accused. Incident admittedly took place at about 4.30 a.m. in the house of accused where injured prosecution witness was found present. House of accused was about 1/2 furlong away from the house of injured witness. Presence of injured witness with wife of accused at that odd hour must have provoked the accused. Provocation was such which could upset not merely a hasty, hot tempered and hypersensitive person, but would upset also a person of ordinary sense and calmness. Case against accused, held, would therefore fall under Section 335, P.P.C. and not under Section 326, P.P.C. Conviction of accused was altered from Section 326, P.P.C. to Section 335, P.P.C. and his sentence was reduced to that already under-gone by him in circumstances.

PUNISHMENT FOR ITLAF-E-SALAHYAT-E-UDW : According to Section 336, whoever by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, cause Itlat-e-Salahiyat e-Udw, of any person, shall, in consultation with the authorised medical officer, be punished with Qisas and if the Qisas is not executable keeping in view the principles of equality in accordance with the injunction of Islam, the offender shall be liable to Arsh and may also be punished with imprisonment of either description for a term which may extend to ten years as Tazir.

APPRECIATION OF EVIDENCE : Injured prosecution witnesses had corroborated each other and their testimony was also

materially corroborated by the medical evidence which inspired confidence and was worth reliance. Accused in a preplanned manner had given brutal beating to the injured witnesses depriving them of their eyesight in a cruel manner. Accused had also kept acid with them which they had used in the attack. Conviction and sentences passed upon the accused by Trial Court were upheld in circumstances.

DOUBLE PUNISHMENT-VALIDITY : Accused had caused injury to the victim while snatching bag from him which resulted into the loss of his eye-sight. Conviction of accused under Section 336/34, P.P.C. was consequently maintained, but their conviction under Section 324/34, P.P.C. was as to whether the attack was made with any weapon or empty-handed. Offence under Section 336, P.P.C. thus was not made out against the accused. Pendency or criminal case against accused, in the circumstances, amounted to abuse of the process of Court and the same was quashed accordingly.

Q. 67. Write a detail note on the offence of Hurt and differentiate between Hurt and Qatl?

Ans. OFFENCE OF 'HURT' : 'Hurt' is harm caused to human body other than death. The essential ingredients of hurt are:

- (1) causing to any person;
- (2) pain, harm, disease infirmity or injury;
- (3) impairing, disabling, or dismembering any organ of the body; or
- (4) without causing the death.

Previously two kinds of hurt were provided in a consolidated form, whereas in the substituted provisions five kinds of hurt are provided wherein various organs and parts of human body have been separately defined.

Different kinds of Hurt : There are five major kinds of hurt provided in the Ordinance. They are being dealt with one by one along with their sub-categories.

1. ITLAF-I-UDW : The word '*Itlaf*' means 'to destroy', 'to ruin' and 'decay'. The word '*udw*' means 'limb' or 'organ'. *Itlaf-i-udw* means to dismember, amputate, or sever any limb or organ of body. (S. 333).

2. ITLAF-I-SALAHIIYYAT-I-UDW : It means destroying or permanently impairing the functioning power or capacity of any organ of the body of a person or causing permanent disfigurement of some organ (S. 335).

There two kinds of hurt are punishable with *Qisas* but where *Qisas* is not executable, the offender shall be punished with *Arsh* and sentence of imprisonment may also be awarded.

Arsh is the compensation specified in the *Qisas* and *Diyat* Ordinance, to be paid by the offender to the victim or to the legal heirs of the victim. *Arsh* is a mandatory punishment prescribed for different types of hurt. The value of *Arsh* is inferred from the value of *Diyat*. There are different types of *Arsh* for different types of hurts.

3. SHAJJAH : *Shajjah* is an Arabic word which means injuries on head or face. Previous provision mentioned permanent disfiguration of head or face while this substituted provision specifies various kinds of *Shajjah* i.e., injuries on head of **face** of a person. (S. 337).

KINDS OF SHAJJAH : There are six kinds of *Shajjah* provided in the Ordinance, elaborating different types of injuries on head or face.

(1) **SHAJJAH-I-KHAFIFAH :** *Shajjah-i-Khaffiah* means simple hurt by any weapon on head or face, without exposing any bone of the victim.

(2) **SHAJJAH-I-MUDIHAH :** It means simple hurt by any weapon on head or face where though bone is exposed but no fracture is caused.

(3) **SHAJJAH-I-HASHIMAH :** *Hashimah* is grievous hurt by any weapon, on head or face, resulting in fracture of bone of victim without dislocating it.

(4) **SHAJJAH-I-MUNAQILLAH :** It is grievous hurt by any weapon on head or face, resulting in fracture and dislocation of bone of victim.

(5) **SHAJJAH-I-AMMAH :** It is grievous hurt by any weapon causing fracture of the skull of the victim, where the wound touches the membrane of the brain.

(6) **SHAJJAH-I-DAMIGHAH :** *Shajjah* of this type is also grievous hurt by any weapon, causing fracture of the skull of the victim, so that the wound ruptures the membrane of the brain.

PUNISHMENTS : Only *Shajjah-i-Mudihah* is punishable with *Qisas* or in alternate with *Arsh* and imprisonment. *Shajjah-i-Khafifah* is punishable with *Daman* and may also be punished with imprisonment. The remaining kinds of *Shajjah* are punishable with *Arsh* and may also be punished with imprisonment as *Tazir*. The punishment of *Arsh* and *Daman* is mandatory whereas the punishment of imprisonment as *Tazir* is discretionary (S. 337-A).

JURH : *Jurh* is derived from the word '*Jarooḥ*' which means injury. The word *Jurh* is used for injuries on human body other than injuries on head or face. These injuries on human body can be divided into two kinds. (S. 337-B).

DISTINCTION BETWEEN HURT AND QATL : The line between *Qatl* and grievous hurt is very thin and subtle one. In one case injuries must be such as are likely to cause death; in the other, the injuries usually be such as endanger life. In one case the victim expires while in the other, he is saved from death. One other distinction between the two is of consequences or of sentence, in case of *Qatl*, the offender is almost always liable to *Diyat* while in case of grievous hurts the offender is liable either for *Arsh* or for *Daman* as compensation to the victim or his legal heirs.

One other aspect of it is the gathering of intention of the offender, i.e. if the offender inflicted such injuries as death is likely from them, and the victim dies, the offender shall be punished for *Qatl-i-Amd*. But if the injuries are such as are not likely in the ordinary course of nature to cause death and death is caused by those injuries, the offender in this case is guilty of *Qatl-Shibh-i-Amd*.

Q. 68. Distinguish between 'Jaifa' and 'Ghairjaifa' injuries. What are various kinds of Ghair-jaifa?

Ans. JAIFAH : *Jaifah* means injury which extends in the body cavity of the trunk.

GHAYR-JAIFA : *Ghayr Jaifa* means injury which does not amount to *Jaifah*. There are six kinds of *Ghayr-jaifah*.

- (i) *Damiya* means injury with any weapon, on any part of body, except head or face in which skin is ruptured and bleeding occurs.
- (ii) *Badiyah* means injury with any weapon on any part of body except head or face, by cutting or incising the flesh without exposing the bone.
- (iii) *Mutlahimah* means injury with any weapon on any part of body except head or face by lacerating the flesh.
- (iv) *Mudihah* means injury with any weapon, on any part of body, except head or face on which bone is exposed.
- (v) *Hashima* means injury with any weapon, on any part of body, except head or face resulting in fracture of a bone without disclosing it.
- (vi) *Munaqqilah* means injury with any weapon on any part of body except head or face resulting in fracture and dislocation of bone.

Punishment of Jaifah is provided in substituted Sections 337-D, P.P.C. and punishment for Ghair-jaifah is provided in Section 337-F, P.P.C. The basic punishment for Jaifah is Arsh and the offender may also be awarded imprisonment as Tazir. Jaifah is a grievous injury whereas some Ghair-jaifah are grievous and some simple hurt. All Ghair Jaifah hurts are punishable with Daman and the offender may also be awarded imprisonment as Tazir.

PUNISHMENT OF GHAIR-JAIFAH : Whoever by doing any act with the intention of causing hurt to any person, or with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person causes---

- (i) Damiya to any person, shall be liable to Daman and may also be punished with imprisonment of either description for a term which may extend to one year as Ta'zir.
- (ii) Badi'ah to any person, shall be liable to Daman and may also be punished with imprisonment of either description for a term which may extend to three years as ta'zir;
- (iii) Mulalahimah to any person, shall be liable to Daman and may also be punished with imprisonment of either description for a term which may extend to three years as Ta'zir.
- (iv) Mudiha to any person, shall be liable to Daman and may also be punished with imprisonment of either description for a term which may extend to five years as Ta'zir ;
- (v) Hashimah to any person, shall be liable to Daman and may also be punished with imprisonment of either description for a term which may extend to five years; and
- (vi) Munaqqilah to any person, shall be liable to Daman and may also be punished with imprisonment of either description for a term which may extend to seven years at Ta'zir.

Q. 69. When in case of Hurt, an accused is not liable to Qisas and when Qisas for Hurt shall not be enforced?

Ans. HURT NOT LIABLE TO QISAS : Hurt shall not be liable to Qisas in the following cases, namely:--

- (a) when the offender is a minor or insane:

Provided that he shall be liable to *Arsh* and also to *Ta'zir* to be determined by the Court having regard to the age to offender circumstances of the case and the nature of hurt caused ;

- (b) When an offender at the instance of the victim causes hurt on him:

Provided that the offender may be liable to *Ta'zir* provided for the kind of hurt caused by him ;

- (c) When the offender has caused *Itlaf-i-udw* of a physically imperfect organ of the victim and the convict does not suffer from similar physical imperfection of such organ:

Provided that the offender shall be liable to *Arsh* and may also be liable to *ta'zir* provided for the kind of hurt caused by him ; and

- (d) When the organ of the offender shall be liable to *Qisas* as missing:

Provided that the offender shall be liable to *Arsh* and may also be liable to *Ta'zir* provided for the kind of hurt caused by him.

Illustrations

- (i) A amputates the right ear of Z, the half of which was already missing. If A's right ear is perfect, he shall be liable to *Arsh* and not *Qisas*.
- (ii) If in the above illustration, Z's ear is physically perfect but without power of hearing. A shall be liable to *Qisas* because the defect in Z's ear is not physical.
- (iii) If in illustration (i) Z's ear is pierced, A shall be liable to *Qisas* because such minor defect is not physical imperfection. (Section 337-M).

Cases in which *Qisas* for hurt shall not be enforced :

(1) The *Qisas* for hurt shall not be enforced in the following cases; namely :--

- (a) When the offender dies before execution of *Qisas*;
- (b) When the organ of the offender liable to *Qisas* is lost before the execution of *Qisas*;

Provided that the offender shall be liable to *Arsh*, and may also be liable to *Ta'zir* provided for the kind of hurt caused by him.

- (c) When the victim waives the *Qisas* or compounds the offence with *Badl-i-Sulh*; or

- (d) When the right of *Qisas* devolves on the person who cannot claim *Qisas* against offender under this Chapter:

Provided that the offender shall be liable to *Arsh* if there is any *Wali* other than the offender, and if there is no *Wali* other than the offender he shall be liable to *Ta'zir* provided for the kind of hurt caused by him.

(2) Notwithstanding anything contained in this Chapter, in all cases of hurt, the Court may, having regard to the kind of hurt caused by him, in addition to payment of Arsh, award Ta'zir to an offender who is a previous convict, habitual or hardened, desperate or dangerous criminal. (Section 337-N).

Q. 70. Distinguish between Isqat-i-Haml and Isqat-i-Janin. What punishment is provided for Isqat-i-Haml?

Ans. ISQAT-I-HAML : Whoever causes a woman with child whose organs have not been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman or providing necessary treatment to her, is said to cause Isqat-i-Haml.

EXPLANATION : A woman who causes herself to miscarry is within the meaning of this section. (Section 338).

PUNISHMENT FOR ISQAT-I-HAML : Whoever causes Isqat-i-Haml shall be liable to punishment as Ta'zir.--

- (a) With imprisonment of either description for a term which may extend to three years, if isqat-i-haml is caused with the consent of the woman, or
- (b) with imprisonment of either description for a term which may extend to ten years, if isqat-i-haml is caused without the consent of the woman :

Provided that, if as a result of isqat-i-haml, any hurt is caused to the woman or she dies, the convict shall also be liable to the punishment provided for such hurt or death as the case may be.

Scope : This section deals with the causing of miscarriage with the consent of a woman, while the next section deals with the causing of miscarriage without her consent.

INGREDIENTS : This section requires two essentials:--

- (1) Voluntarily causing a woman with child to miscarry.
- (2) Such miscarriage should not have been caused in good faith for the purpose of saving the life of a woman. (Section 338-A).

ISQAT-I-JANIN : Whoever causes a woman with child some of whose limbs or organs have been formed to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, is said to cause Isqat-i-janin.

EXPLANATION : A woman who causes herself to miscarry is within the meaning of Section 338-B.

PUNISHMENT FOR ISQAT-I-JANIN : Whoever causes isqat-i-janin shall be liable to--

- (a) One twentieth of the *Diyat* if the child is born dead ;
- (b) full *Diyat* if the child is born alive but dies as a result of any act of the offender ; and
- (c) imprisonment of either description for a term which may extend to seven years as *Ta'zir*.

Provided that, if there are more than one child in the womb of the woman, the offender shall be liable to separate *Diyat* or *Ta'zir*, as the case may be, for every such child :

Provided further that if as a result of *Isqat-i-Janin*, any hurt is caused to the woman or she dies, the offender shall also be liable to the punishment provided for such hurt or death, as the case may be (Section 338-C).

CHAPTER XV

OF WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

(Sections 339-377)

Q. 71. Define "wrongful restraint" and wrongful confinement" and distinguish between the two?

Ans. WRONGFUL RESTRAINT : The expression 'wrongful restraint' implies keeping a man out of a place where he wishes and a right to be. Section 339 defines it thus : "Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

ILLUSTRATION : A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z. Similarly, A threatens to set a savage dog at Z, if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path. A wrongfully restrains Z.

WRONGFUL CONFINEMENT : Section 340 lays down that who-ever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits is said "wrongfully to confine" that person. To cite an illustration, A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of the wall. A wrongfully confines Z. Similarly, A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

DIFFERENCE BETWEEN WRONGFUL CONFINEMENT AND WRONGFUL RESTRAINT : As regards the difference between the two, wrongful confinement, in the first place, is a form of wrongful restraint. It is keeping a man within limits out of which he wishes to go and has a right to go, while wrongful restraint is keeping a man out of a place where he wishes to be, and has a right to be. In the second place, in wrongful confinement a person is restrained from moving beyond a certain area within which he is confined, but in wrongful restraint he is free to move anywhere other than to proceed in a particular direction. In other words, there is full restraint in the former, but only partial in the latter. And, lastly, wrongful confinement is a more serious offence inasmuch as it prescribes punishment with imprisonment, simple or rigorous, extending to one year, or fine up to Rs. 1,000, or both, while wrongful restraint is punishable with simple imprisonment up to one month, or with fine up to Rs. 500, or both.

Q. 72. Define and illustrate force, criminal force and Assault. Bring out the difference between (i) Assault and criminal force ; (ii) Assault and Affray ; and (iii) Assault and Battery?

Ans. FORCE : Section 349 defines 'force' thus : "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling : Provided that the person causing the motion, or change of motion or cessation of motion, causes that motion, change of motion, or cessation of motion, in one of the three ways namely first by his own bodily power; secondly, by disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person ; and thirdly, by inducing any animal to move, to change its motion, or to cease to move." The term "force" contemplates here the use of force to a person and not to a thing, and as such the presence of the person using the force and of the person to whom it is used is essential.

CRIMINAL FORCE : Section 350 defines "criminal force." It says: "Whoever intentionally uses force to any person, without that persons' consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

ILLUSTRATIONS : (a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A uses force to Z by disposing substances in such a manner that the motion is produced ; and if A has done so without Z's consent, intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horse, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has, therefore, used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(c) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if

he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(d) A intentionally pulls up a woman's veil.

(e) Z is bathing. A pours into the bath water which he knows to be boiling.

(f) A incites a dog to spring upon Z without Z's consent. A has used force to the woman in (d) or to Z in (e) and (f) and if A has done so without the woman's or Z's consent, intending to cause injury, fear or annoyance to the woman or to Z, he uses criminal force to her or to Z.

ASSAULT : Section 351 lays down that whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to their person, is said to commit an assault.

Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

ILLUSTRATIONS : (a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause that dog to attack Z. A has committed an assault upon Z.

(c) A takes up a stick, saying to Z "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

(Sentence three months ; fine Rs. 500, or both).

(i) ASSAULT AND CRIMINAL FORCE : An assault is something less than the use of criminal force, the force being cut short before that blow actually falls. It seems to consist in an attempt or offer by a person having person ability with force to do any hurt or violence to the person of another. And it is committed whenever a well-founded apprehension of immediate peril from a force already partially or fully put in motion is created. Thus in the case of assault the person assaulting puts another in reasonable fear of criminal force by means of a threat, gesture or preparation, but in criminal

force the offender actually does something to the person to whom criminal force is used. To shake one's fist at a person is an assault, but to bring it into contact with the force itself is criminal force. Therefore an assault is included in every use of criminal force.

(ii) ASSAULT AND AFFRAY : (1) Assault may take place either in a public place or private but an affray must always be committed in a public place. (2) An assault is an offence against the person of an individual, but an affray is an offence against the public peace. (3) Assault may be committed even by one person but an affray must be committed by two or more persons. (4) In the case of an assault the punishment provided is slightly higher than that provided in the case of an affray.

(iii) ASSAULT AND BATTERY : The word "battery" has not been defined in the Pakistan Penal Code. In the English Law battery has been defined as any less hurt or violence unlawfully and wilfully or culpably done to the person of another. The term 'battery' as understood in English Law is, therefore, included in criminal force as defined in the Pakistan Penal Code. The two expressions 'criminal force' and 'assault' have been discussed earlier and need not be repeated here. Suffice it to say that when a person shakes his fist at another standing by him, he is guilty of assault, but if he strikes that another, he is guilty for using criminal force or battery. Physical contact is, therefore, necessary in the case of battery, but not in the case of assault.

Q. 73. (1) What are the ingredients of the offence of kidnapping? (2) Is the consent of the party kidnapped to be taken into consideration? (3) "The offence of kidnapping a minor girl from lawful guardianship is not a continuing offence." Explain.

Ans. (1) **KIDNAPPING :** Kidnapping is of two kinds, viz., kidnapping from Pakistan and kidnapping from lawful guardianship.

Section 360 says, "Whoever conveys any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorised to consent on behalf of that person is said to kidnap that person from Pakistan." (Seven years and fine). The essentials of this section are, therefore, the conveying of any person beyond the limits of Pakistan and such conveying must be without the consent of that person. It is apparent from the above that the offence with regard to kidnapping from Pakistan may be committed on a grown up person or a minor by conveying him or her beyond the limits of Pakistan.

Section 361 says "Whoever takes or entices any minor under fourteen years of age, if a male, or under sixteen years of age if a female or any person of unsound mind, out of the keeping of the

lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship." (7 years and fine). The essential ingredients of the offence of kidnapping from lawful guardianship are:

- (1) taking or enticing away a minor or a person of unsound mind;
- (2) such minor must be under 14 years of age if a male, or under 16 years of age if a female;
- (3) such minor or person of unsound mind must be in the keeping of a lawful guardian ;
- (4) the taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind; and
- (5) such taking or enticing must be without the consent of such guardian.

(2) The taking or enticing of the minor out of the keeping of the lawful guardian must be without his consent. The consent of the minor is immaterial. Consent given by the guardian after the commission of the offence would be of no avail. If a man by false and fraudulent representation induces the parents of a girl to allow him to take her away, such taking will amount to kidnapping.

(3) The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence so long as the minor is kept out of such guardianship. The word "taking" as used in Section 361, P.P.C. does not mean a continuing or continuous act. The "taking" which constitutes the offence is completed as soon as the girl is removed from the keeping of the lawful guardian.

Q. 74. A girl aged 6 years which engaged in play was induced by accused to accompany him to a deserted house. Was the girl removed from lawful custody of her parents and what offence was committed ?

Ans. Girl aged 6 years went with her father to another locality and while engaged in play the accused induced her to accompany him to a deserted house and tried there to rape her. Girl while engaged in playing remained in lawful custody of her father. Custody terminated as soon as girl was induced to accompany accused to a deserted place for purpose of satisfying his animal lust. Ingredients of offence under Section 364-A were satisfied and accused was rightly convicted.

The girl while she was engaged in playing, remained in the lawful custody of her father, which was terminated, as soon as she was induced to accompany the accused towards the deserted house for no other purpose than to satisfy his animal lust. These two ingredients being satisfied, the conviction of the appellant for an offence under Section 364-A, P.P.C. becomes unquestionable.

Q. 75. Define Abduction. How does it differ from kidnapping?

Ans. ABDUCTION : Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person. (S. 362). The two essential ingredients of the offence of abduction are forceful compulsion or inducement by deceitful means and the object of such compulsion or inducement must be the going of a person from any place.

<i>Kidnapping from Guardianship</i>	<i>Abduction</i>
(1) It is committed only in respect of a minor under 14 years of age if a male and under 16 years if a female or a person of unsound mind.	(1) It is committed in respect of any person of any age.
(2) The person kidnapped is removed from lawful guardianship. A child without a guardian cannot be kidnapped.	(2) Not necessary.
(3) The minor or the person of unsound mind is simply taken away or enticed to go with the kidnapper. The means employed may be innocent.	(3) Force, compulsion or deceitful means are employed.
(4) Consent of the person enticed is immaterial.	(4) Consent of the person removed, if freely and voluntarily given, condones the offence.
(5) The intent of the offender is irrelevant.	(5) It is very important. Abduction must be with certain intent.

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| (6) It is not a continuing offence. The offence is complete as soon as the minor is removed from the custody of his or her guardian. | (6) A person is being abducted both when he is first taken from any place and also when he is removed from one place to another. |
| (7) It is a substantive offence. | (7) Not punishable by itself unless accompanied with some criminal intent. |

Kidnapping from Pakistan

Abduction

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| (1) It can be committed in respect of any person irrespective of his age. | (1) So also abduction. |
| (2) There is no kidnapping from Pakistan if the person kidnapped is capable by law of giving consent and is a consenting party. | (2) Consent, if freely and voluntarily given, condones the offence. |
| (3) It is a continuous offence and may be abetted. | (3) So also abduction. |
| (4) The place to which the victim is taken must be outside the limits of Pakistan. | (4) The place is not important. |
| (5) It is a substantive offence. | (5) It is an auxiliary act, not punishable by itself unless accompanied with some criminal intent. |

Provisions under (Enforcement of Hudood) Ordinance, 1979 : There is a marked difference between Sections 11 and 16 of Ordinance, VII of 1979 and Sections 362 and 498 of the Penal Code.

The provisions of the Penal Code make no distinction between sexes of victims of offence of abduction and confine offence of enticing or taking away only against a married woman under Section 498 but the Ordinance creates such offences only against females. Possible though a female to commit such offences against another female yet no abduction or enticing or taking away of a male person by a female offender could take place. Likewise it is not necessary under the Ordinance for enticed woman to be married or of any particular age or status.

Again the offence under Section 11 is committed only against a female. Thus a female cannot be held guilty of offence of abduction of a male person.

Q. 76. What are the ingredients of the offence of rape? What is the maximum punishment provided for this offence?

Ans. INGREDIENTS OF THE OFFENCE OF RAPE : A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: First, against her will; Secondly, without her consent; thirdly, with her consent, when her consent has been obtained by putting her in fear of death, or of hurt; fourthly, with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; and, fifthly, with or without her consent, when she is under fourteen years of age.

EXPLANATION : Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

EXCEPTION : Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape. (S. 375).

PUNISHMENT : Imprisonment for life or imprisonment extending to ten years and fine; but if the woman raped is the offender's own wife and is not under 12 years of age the punishment is imprisonment which may extend to 2 years or fine or both.

This offence is punishable under Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

CHAPTER XVI

OF OFFENCES AGAINST PROPERTY

(Sections 378-462)

Q. 77. Define and illustration "Theft". Point out the essential ingredients?

Ans. THEFT : Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent moves that property in order to such taking, is said to commit theft. (S. 378). The punishment provided for it is three years and/or fine.

INGREDIENTS : In order to constitute theft the following five ingredients are necessary :

(1) DISHONEST INTENTION TO TAKE PROPERTY
: It is initially for the prosecution to prove that the accused had acted dishonestly and where the circumstances show that the property has been removed in the assertion of a *bona fide* claim or right, it is not theft. A person can, however, be convicted of stealing his own property as where A having pawned his watch to Z takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch. And though the watch is his own property. A commits theft as he takes it dishonestly. Similarly if A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly. But if A having not owed to Z any debt for which Z could detain the watch as security, enters the shop openly and takes his watch by force out of Z's hand, A is not guilty of theft as he did not act dishonestly although he may have committed criminal trespass and assault. Similarly if A in good faith, believing a property belonging to Z to be A's own property, takes that property out of B's possession, A, as he does not take it dishonestly, does not commit theft. But if A takes an article belonging to Z out of Z's possession without Z's consent with the intention of keeping it until he obtains money from Z as a reward for its restoration. A having taken the article dishonestly has committed theft. A servant is, however, not guilty of theft when what he does is at his master's bidding, unless he participates in his master's knowledge of the dishonest nature of the acts. But if the servant entrusted by his master with the care of a certain movable property runs away with it without his master's consent the servant is guilty of theft.

(2) THE PROPERTY MUST BE MOVABLE : A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; it becomes capable of being the subject of theft when it is severed from the earth.

(3) IT SHOULD BE TAKEN OUT OF POSSESSION OF ANOTHER PERSON : The property must be in the possession of another person from where it is removed. There is no theft of wild animals, birds or fish while at large, but there is a theft of tamed animals. A finds a ring lying on the highroad, not in the possession of any person. A, by taking it, commits not theft, though he may commit criminal misappropriation of property.

(4) IT SHOULD BE TAKEN WITHOUT CONSENT OF THAT PERSON : The consent may be express or implied and may be given either by the person in possession, or by any person having for that purpose express or implied authority. A being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose of merely reading it (and with the intention of returning it). Here it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft. A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorised to give away aims. If this was A's impression, A has not committed theft. The position is not the same if A is the paramour of Z's wife and she gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(5) THERE MUST BE SOME REMOVAL OF THE PROPERTY IN ORDER TO ACCOMPLISH THE TAKING OF IT : A puts a bait for dogs in his pocket, and induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A. Again A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure. Similarly, A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here, A, at the time of first moving the ring, commits theft.

Q. 78. Define and illustrate extortion and distinguish between extortion and theft?

Ans. EXTORTION : Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person

any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion". (S. 383) (punishment up to three years and/or fine).

The chief elements of extortion are the intentional putting of a person in fear of injury to himself or another and dishonestly inducing the person so put in fear to deliver to any person any property or valuable security.

(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion.

(c) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

Extortion

- (1) Consent is obtained by putting the person in possession of property in fear of injury to himself or to any other person, i.e., there is wrongful obtaining of consent.
- (2) Both movable and immovable property may be the subject of the offence.
- (3) There is the element of force, for property is obtained by putting a person in fear of injury to that person or any other.

Theft

- (1) The offender's intention is to take without the owner's consent.
- (2) It is limited only to movable property.
- (3) There is no element of force.

Q. 79. What are the ingredients of the offence of Robbery? What is the punishment prescribed for this offence? Give illustrations.

Ans. ROBBERY : In all robbery there is either theft or extortion.

WHEN THEFT IS ROBBERY : Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

WHEN EXTORTION IS ROBBERY : Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted. (S. 390).

To put it shortly, robbery is (1) theft plus violence (causing or attempting to cause death, hurt or wrongful restraint) or fear of instant violence or (2) extortion plus offender present plus fear of instant violence plus immediate delivery of the thing extorted.

ILLUSTRATION : (a) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has, therefore, committed robbery.

(b) A meets Z on the highroad, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has, therefore, committed robbery.

(c) A meets Z and Z's child on the highroad. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has, therefore, committed robbery on Z.

(d) A obtains property from Z by saying--"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and punishable as such ; but it is not robbery, unless Z is put in fear of the instant death of his child.

It is apparent from the above that there is no case of robbery which does not fall within the definition either of theft or of extortion ; but in practice it will always be a matter of doubt whether a particular act of robbery was a theft or an extortion. A seizes Z, threatens to murder him unless he delivers all his property, and begins to pull off Z's ornaments. Z, in terror begs that A will take all he has, and spare his life, assists in taking off his ornaments, and delivers them to A. Here, such ornaments as A took without Z's

consent are taken by theft. Those which Z delivered up from fear of death are acquired by extortion. It is probable that Z's right-arm bracelet may have been obtained by theft, and left-arm bracelet by extortion.

PUNISHMENT : Imprisonment up to ten years and also fine, but if robbery committed on the highway between sunset and sunrise up to 14 years.

Q. 80. What are ingredients of offence of Dacoity? What is the punishment provided for same?

Ans. DACOITY : When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt amount to five or more, every person so committing, attempting or aiding, is said to commit dacoity. (S. 391). (Punishment : imprisonment for life or up to 10 years R.I. and also fine).

Dacoity is robbery committed by five or more persons, and so it must be either theft or extortion. It is a more serious offence than robbery because of the terror caused by the presence of a number of offenders. Abettors who are present and aiding when the crime is committed are counted in the number. The definition of dacoity includes attempt to commit dacoity. Further, dacoity furnishes another instance of constructive liability, inasmuch as if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment which may extend to ten years and also fine.

Q. 81. Distinguish between (1) theft and robbery; (2) Extortion and robbery; (3) Robbery and dacoity; (4) Extortion, theft and dacoity?

Ans. (1) THEFT AND ROBBERY : Theft means the taking away dishonestly any movable property of another without that persons' consent i.e., by stealth. Theft becomes robbery if in the course of it the offender causes or attempts to cause death, hurt or wrongful restraint, or fear of instant death, hurt or wrongful restraint.

(2) EXTORTION AND ROBBERY : In extortion a person is forced to deliver any property against his will when he is put in fear of injury to himself or another and is dishonestly induced to deliver the property. But whenever, theft is accompanied by violence or fear of instant violence, or extortion is accompanied by violence or fear of instant violence, the presence of the offender and the delivery of the thing extorted, there is robbery.

(3) ROBBERY AND DACOITY : The essence of the difference between the two lies only in the number of persons involved in the offence. Dacoity is robbery committed by five or more persons otherwise both are the same.

(4) EXTORTION, THEFT, ROBBERY AND DACOITY : Extortion occupies a middle place between theft and robbery or dacoity. Dacoity is robbery by five or more persons conjointly committed or attempted to be committed. Robbery, on the other hand, is a special and aggravated form of either theft or extortion. Theft is robbery if in the course of it the offender voluntarily causes or attempts to cause to any person death, hurt or wrongful restraint, or fear of instant death, hurt or wrongful restraint. Thus, if hurt is actually caused when the offence is committed the offence is punishable as robbery. Extortion is robbery if the former is accompanied by violence (i.e., by putting the person in fear of instant death, hurt or wrongful restraint), presence of the offender and delivery of the thing extorted.

Extortion differs from theft inasmuch as in the former there is the wrongful obtaining of consent by putting the person in possession of property in fear of injury to him or to any other. The offence of extortion is carried out by overpowering the will of the owner. In theft there is never the intention of the offender to obtain the consent of the owner of the property. Moreover in theft the property involved is movable property but in case of extortion it may be any property.

Q. 82. Explain Criminal misappropriation. Distinguish it from Theft?

Ans. CRIMINAL MISAPPROPRIATION : The offence of criminal misappropriation consists in dishonest misappropriation or conversion to his own use any movable property. (S. 403). It takes place when the possession has been innocently come by, but by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent. A takes property belonging to Z out of Z's possession in good faith believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under Section 403 of dishonest misappropriation of property. Similarly, A and B, being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under Section 403, P.P.C.

Explanation 1 to Section 403 provides that a dishonest misappropriation for a time only is a misappropriation within the meaning of this section. For example, A finds a Government promissory note belonging to Z, bearing a blank endorsement, A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a further time to restore it to Z. A has committed an offence under this section.

Explanation 2 to this section provides that a person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence defined above, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property for a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it ; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

ILLUSTRATIONS : (a) A finds a rupee on the highroad, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in Section 403.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence of dishonest misappropriation of property under this section.

(c) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z : but afterwards appropriates it to his own use. A has committed an offence of dishonest misappropriation.

(d) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under the above section.

(e) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under Section 403 of the Pakistan Penal Code.

It would thus appear from the above illustrations that the two main ingredients of the offence are dishonest misappropriation or conversion of property for a persons's own use and such property must be movable.

The punishment prescribed for the offence is imprisonment for a term which may extend to two years, or with fine, or with both.

DIFFERENCE BETWEEN THEFT AND CRIMINAL MISAPPROPRIATION : Following is the difference between theft and criminal misappropriation.

<i>Theft</i>	<i>Criminal misappropriation</i>
(1) The object of the offender is to take property from another person's possession, and the offence is complete as soon as the offender has moved the property dishonestly.	(1) The offender is already in possession of the property and his possession is not punishable either because he has lawfully obtained it, or because he has found it or is a joint owner of it or has acquired it under some mistaken notion.
(2) The moving of property itself is an offence.	(2) The moving of property may be perfectly lawful ; it is the subsequent intention to dishonestly misappropriate or convert it to his own use that is an offence. *
(3) The moving of property takes place without the consent of the owner.	(3) The possession may even be with the consent of the owner, e.g., he may be a joint owner.
(4) The dishonest intention precedes the act of taking.	(4) It is the subsequent intention to misappropriate or convert to his own use that constitutes the offence.

Q. 83. Explain criminal breach of trust. Distinguish it from (1) Theft and (2) Criminal misappropriation?

Ans. CRIMINAL BREACH OF TRUST : A person commits criminal breach of trust if he (1) being in any manner entrusted with property, or with any dominion over property, (2) dishonestly misappropriates or converts to his own use that property, or (3) dishonestly uses or disposes of that property in violation (i) of any direction of law prescribing the mode in which such trust is to be discharged, or (ii) of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do. (S. 405). (Punishment three years, fine, or both.)

The word "entrustment" connotes that the person holds the property in a fiduciary capacity. There can be no breach of trust when there has been no entrustment or dominion of the property on trust. There must be dishonest misappropriation or conversion to his own use or dishonest using or disposing of that property. If it is done in good faith there is no criminal breach of trust.

ILLUSTRATIONS : (a) A, being executor to the will of a deceased person, dishonestly, disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Dacca is an agent for Z, residing at Lahore. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lac of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss yet A, not having acted dishonestly has not committed criminal breach of trust.

(e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

(1) THEFT AND CRIMINAL BREACH OF TRUST : In the former there is a wrongful taking of a movable property out of the possession of the owner, i.e., by stealth without the owner's knowledge, but in the latter the property is given on trust or received on one's behalf and instead of discharging the trust, it is dishonestly misappropriated or used or disposed of in violation of the law. The owner here parts with something in good faith but the person who takes it keeps the thing for himself. In theft there is no

prior lawful possession ; the offence is completed as soon as the property is dishonestly taken away, but in criminal breach of trust the offender prior to the offence is himself in possession of the property and the offence is completed when he dishonestly converts the same to his own use. Then in theft the property involved is a movable property, but in criminal breach of trust it may be any property. Criminal breach of trust is ordinarily punished with the same severity as theft, but where there is a greater degree of trust as in the case of a carrier, or a clerk or a servant entrusted with his master's property or in the case of a public servant or banker, heavier punishment is provided under Sections 407, 408 and 409, P.P.C.

(2) CRIMINAL MISAPPROPRIATION AND CRIMINAL BREACH OF TRUST : Following is the difference between Criminal misappropriation and Criminal breach of Trust:-

- (1) In criminal misappropriation the property comes into the possession of the offender by some casualty or otherwise and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property and he dishonestly misappropriates the same, or wilfully suffers any other person to do so, instead of discharging the trust attached to it. (*Ratan Lal*).
- (2) In criminal misappropriation there is no contractual relationship, but there is such a relationship in criminal breach of trust.
- (3) In criminal misappropriation there is the conversion of property coming into possession of the offender anyhow, but in criminal breach of trust there is the conversion of property held in a fiduciary character.
- (4) A breach of trust includes criminal misappropriation, but the converse is not always true.

Q. 84 (1) Define stolen property. (2) When is receiving or retaining stolen property punishable ? (3) In this connection bring out the difference between dishonest retention and dishonest reception of the property. (4) In a house occupied by a joint family including several male and female members, certain stolen property was found in a locked box, the key of which was in the possession of the wife of one of the men, who, however, was not in the house. The Court convicted the husband under Section 411, P.P.C. Is the conviction justified? Give reasons.

Ans. (1) **STOLEN PROPERTY :** Section 410 defines stolen property as property the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of

trust has been committed within or without Pakistan. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

(2) RECEIVING STOLEN PROPERTY : The mere possession of stolen property is not an offence. The essence of the offence of receiving stolen property under Section 411 consists in the receipt or retention of the same with a full knowledge at the time of receipt that the property was stolen property *viz.*, obtained in one of the ways specified in (a) above. The accused should dishonestly receive or retain the stolen property, knowing or having reason to believe the same to be stolen property. A person is said to be acting dishonestly when he acts with the intention to cause wrongful gain to himself or wrongful loss to another. Section 411 lays down that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

The word "believe" in Section 411, P.P.C., is much stronger than "suspect" inasmuch as it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convicted in his mind that property with which he was dealing must be stolen property.

(3) Dishonest retention and dishonest reception of property : In dishonest retention dishonestly supervenes after the act of acquisition of possession, while in dishonest reception dishonesty is contemporaneous with the act of such acquisition. To constitute dishonest retention, there must have been a change in the mental element of possession from an honest to a dishonest condition of the mind in relation to the thing possessed. A person cannot be convicted of "receiving" if he had no guilty knowledge at the time of receipt. But he is guilty of "retaining" if he subsequently knows or has reason to believe that the property was stolen. The offence of dishonest retention of stolen property may be complete without any guilty knowledge at the time of receipt. But in order to support a conviction of dishonestly retaining stolen property, it ought to be shown that the accused, being in innocent possession of the property, acquired the knowledge that it was stolen, and thereafter retained in dishonestly.

(4) House occupied by joint family : From the mere fact that stolen articles are found in a locked box in a room in the joint occupation and possession of a husband and wife it cannot be said with certainty that the husband knows of the existence of the things and he cannot be convicted of an offence under Section 411 without proof that he was in exclusive possession. In such a case it cannot be presumed that the possession of the wife is *per se* the possession of the husband.

Q. 85. (i) What is "Cheating"? Illustrate your answer.

(ii) A takes money from various persons, who are applicants for motor driving licences, and procures licences without the necessity of their undergoing any test by attaching forged certificates to their application. What offence has been committed by A?

(iii) A debtor sent to his creditor a postal cover insured for Rs. 70. The creditor took delivery after signing the postal receipt but the cover when opened contained seven one-rupee notes and four blank sheets. The debtor also called upon the creditor to give credit for Rs. 70 sent by insured cover. What offence has the debtor committed?

Ans. (i) CHEATING : Whoever, be deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to "cheat." (S. 415).

Explanation : A dishonest concealment of facts is a deception within the meaning of this section. (S. 415) (one year with or without fine).

INGREDIENTS : The essential ingredients of the offence are : (1) deception of any person; and (2) (a) fraudulently or dishonestly inducing that person (i) to deliver any property to any person, or (ii) to consent that any person shall retain any property; (b) intentionally inducing that person to do or omit to do anything which he would not do, etc.

To constitute the offence of cheating it is not necessary that the act which the person deceived is induced to do should actually cause harm to him. It is enough that the act which the person deceived has been induced to perform is likely to cause damage or harm to him.

ILLUSTRATIONS : (a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z buy and pay for the article. A cheats.

(c) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(d) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(e) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(f) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

(ii) A is guilty of the offence of cheating. The licence is property within the meaning of Section 420 of the Pakistan Penal Code.

(iii) It has been held that the debtor was guilty of cheating and not merely of an attempt to cheat.

Q. 86. Distinguish between (1) cheating and extortion; (2) cheating and theft; and (3) cheating and criminal misappropriation and criminal breach of trust?

Ans. (1) CHEATING AND EXTORTION : Both these offences are committed by obtaining wrongful consent. In the case of extortion, however, the extortioner obtains consent by intimidation ; but the cheat obtains it by deception. Extortion is committed by putting a person in fear of injury or when he is compelled to part with his property by threats ; but in the case of cheating the person is induced by fraudulent or dishonest means to deliver the property.

(2) CHEATING AND THEFT : Cheating differs from theft inasmuch as in cheating property is taken with the owner's consent obtained by deception, while in theft the property is taken without the owner's consent. The property involved in cheating may be movable or immovable ; it is always movable in theft.

(3) CHEATING AND CRIMINAL MISAPPROPRIATION AND CRIMINAL BREACH OF TRUST : (1) In cheating possession of the property is obtained by practising deception or fraudulent means. In criminal misappropriation the property comes by into the possession of the offender innocently, i.e., by some casualty and the subsequent change of his intention to misappropriate it makes the possession

wrongful and fraudulent. In criminal breach of trust the offender is lawfully entrusted with the property, but he dishonestly misappropriates or converts to his own use that property, or suffers any other person so to do.

(2) Cheating involves practising of deception for acquiring property. There is neither fiduciary relationship nor any conversion of property. In criminal misappropriation the property comes into the possession of the offender innocently and there is no fiduciary relationship. In criminal breach of trust there is the conversion of property held by a person in a fiduciary relationship.

(3) In cheating and criminal breach of trust the property may either be movable or immovable, but in criminal misappropriation the property which is dishonestly misappropriated or converted to his own use is always movable property.

Q. 87. Analyse the offence of Mischief. Illustrate your answer?

Ans. MISCHIEF : Section 425 lays down that whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief."

EXPLANATION 1 : It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

EXPLANATION 2 : Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly. (Punishment upto three months or with fine or both.)

To constitute an offence under this section there must be an intention to cause wrongful loss or damage, or causing the destruction of some property or any change in it or in its situation and such change must destroy or diminish its value or utility, or affect it injuriously.

ILLUSTRATIONS : (1) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(2) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(3) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(4) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

Q. 88. Explain (1) Criminal trespass, (2) House-trespass, (3) Lurking house-trespass and (4) Lurking house-trespass by night?

Ans. (1) CRIMINAL TRESPASS : Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there, with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass". (Section 441). (Punishment ; 3 months' imprisonment or fine up to Rs. 500, or both).

In order to constitute the offence of criminal trespass the prosecution must prove that the trespass was made with one of the intents specified in Section 441 above. Intention is the *sine qua non*. A trespass, therefore unless it is accompanied by a criminal intent is not criminal trespass. Where a person who having no intention to intimidate, insult or annoy takes possession of another's property in exercise of a *bona fide* claim of right he is not criminally liable.

(2) HOUSE TRESPASS : Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass."

EXPLANATION : The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass. (Section 442).

(Imprisonment : One year or fine up to Rs. 1,000 or both).

To constitute an offence of house-trespass it is not enough that there should be an entry into a house without fulfilling other conditions required by law. It further requires an intent either to commit an offence or to intimidate, insult or annoy any person in possession.

(3) LURKING HOUSE-TRESPASS : Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass." (Sec. 443). (Two years' imprisonment and fine).

This is an aggravated form of trespass being committed surreptitiously.

(4) LURKING HOUSE-TRESPASS BY NIGHT : Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night." (Sec. 444). (Imprisonment : 3 years and fine.)

Q. 89. (1) Describe the several elements which constitute the offence of house-breaking. Illustrate your answer. (2) Explain house-breaking by night?

Ans. (1) HOUSE-BREAKING : A person is said to commit "house-breaking": who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways thereafter described or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence, therein, he quits the house or any part of it in any of such six ways, that is to say :

*First--*If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

*Secondly--*If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance : or through any passage to which he has obtained access by scaling or climbing over any wall or building.

*Thirdly--*If he enters or quits through any passage which he or any abettor of the house-trespass has opened in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

*Fourthly--*If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after house-trespass.

Fifthly--If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Sixthly--If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation : Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section. (Sec. 445).

Illustrations : (i) A commits house-trespass by making a hole through the wall of Z's house and putting his hand through the aperture.

(ii) A commits house-trespass by creeping into a ship at a port-hole between decks.

(iii) A commits house-trespass by entering Z's house through a window.

(iv) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened.

(v) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door.

(vi) A finds the key of Z's house-door, which Z has lost, and commits house-trespass by entering Z's house, having opened the door with that key.

(vii) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house.

(viii) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him.

In all the above cases (i) to (viii) the offence committed is house-breaking. (Punishment : Two years and fine).

(2) HOUSE-BREAKING BY NIGHT : House-breaking after sunset and before sunrise is said to be "house-breaking by night". (Sec. 446). (Punishment: Three years and fine).

Q. 90. Distinguish between "Criminal trespass, house-trespass and house-breaking"?

Ans. DISTINCTION BETWEEN "CRIMINAL TRESPASS", "HOUSE-TRESPASS" AND "HOUSE-BREAKING" : Criminal trespass may be committed by entering upon another's property with intent to intimidate, insult or annoy that person. If the property is used as a human dwelling the offence of criminal trespass becomes the offence of house-trespass. But if the offence of house-trespass is further aggravated by the entry or departure of a forcible nature or entry or departure, through any passage not intended for human entrance or departure, then the offence becomes house-breaking. House-breaking is thus an aggravated form of criminal trespass.

In all "house-breaking", there must be "house-trespass" and in all "house-trespass" there must be "criminal trespass." In order therefore, to establish an offence either of house-breaking or house-trespass the intent necessary to prove "criminal trespass" must be present.

CHAPTER XVII & CHAPTER XVIII

(Sections 463-492)

Not Relevant Omitted.

CHAPTER XIX

OF OFFENCES RELATING TO MARRIAGE

(Sections 493-498)

Q. 91. What are the several offences set out in the Pakistan Penal Code relating to marriage?

Ans. **OFFENCES RELATING TO MARRIAGE :** The following are the provisions in the Pakistan Penal Code dealing with the offences relating to marriage :

- (1) Cohabitation caused by a man deceitfully inducing a belief of lawful marriage (S. 493) (Ten years and fine);
- (2) Dishonestly or fraudulently going through a marriage ceremony knowing that no lawful marriage is thereby created (Sec. 496) (7 years and fine);
- (3) Bigamy, i.e. marrying again during the lifetime of the husband or wife where such marriage is void (Sec. 494) (7 years and fine);
- (4) In (3) above if the former marriage is concealed from the person with whom the subsequent marriage is contracted, the punishment is ten years and fine (Sec. 495);
- (5) Adultery (Sec. 497) (5 years or fine or both); and
- (6) Enticing or taking away or detaining with criminal intent a married woman (Sec. 498) (Two years, or fine or both).

Q. 92. What is Bigamy? Under what circumstances would a woman, who, in the lifetime of one husband, marries another not be guilty of bigamy?

Ans. BIGAMY : Section 494 defines the offence of bigamy as under: "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

This section does not apply to Hindu or Muslim males who are allowed to marry more than one wife but it applies to Hindu and Muslim females and to Christians and Parsis of either sex. The validity of a marriage in the case of Hindus, Muslims, Budhists will be determined in accordance with their religious usage. In the case of Christians it will be determined by Act XV of 1872 and of Parsis by Act III of 1936. The validity of a marriage celebrated under the Special Marriage Act will be determined by its provisions.

If the first marriage is not a valid marriage no offence will be committed by contracting a second marriage. For instance, if A marries B, a person within prohibited degree of affinity, and during B's lifetime marries C, A has not committed bigamy.

The Exception to Section 494 provides the circumstances where a woman in the lifetime of one husband or *vice versa* can marry another without incurring the offence of bigamy. It provides that Section 494 does not extend (a) to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor (b) to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

OF DEFAMATION.

(Sections 499-502)

Q. 93. Define and discuss the Law of Defamation as embodied in the Pakistan Penal Code, noting the exceptions which can be taken in defence. Or discuss when an ordinary defamatory statement does not involve any criminal liability?

Ans. LAW OF DEFAMATION : The law of defamation is embodied in Section 499 of the Pakistan Penal Code. It reads : "whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person is said, except in the cases hereinafter excepted to defame the person."

ESSENTIALS : The section requires three essentials :

(1) Making or publishing any imputation concerning any person.

(2) That imputation must have been made by ;

(a) words, either spoken or intended to be read ; or

(b) signs ; or

(c) visible representations ;

(3) Such imputation must be with the intention of harming or with knowledge that it will harm the reputation of the person concerning whom it is made.

EXPLANATIONS : The explanations appended to the section quoted above lay down that it may amount to defamation:

(1) to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives;

(2) to make an imputation concerning a company of an association or collection of persons as such ;

(3) to make an imputation in the form of an alternative or expressed ironically ;

(4) but no imputation is said to harm a person's reputation, unless that imputation, directly or

indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person or cause it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

ILLUSTRATIONS : (a). A says : "Z is an honest man ; he never stole B's watch" intending to cause it to be believed that Z did steal B's watch ;

(b) A is asked who stole B's watch, A points to Z, intending to cause it to be believed that Z stole B's watch ;

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch.

In each of the three cases, there is defamation, unless it falls within one of the exceptions noted below.

The Exceptions to Section 499 printing out the cases where an ordinary defamatory statement does not involve any criminal liability are as under :

FIRST EXCEPTION : It is not defamation to impute anything which is true concerning any person, if it be for the public good that the Imputation should be made or published. Whether or not it is for the public good is a question of fact.

SECOND EXCEPTION : It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

THIRD EXCEPTION : It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character so far as his character appears in that conduct, and no further.

ILLUSTRATIONS : It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

FOURTH EXCEPTION : It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

FIFTH EXCEPTION : It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person as far as his character, appears in that conduct, and no further.

ILLUSTRATIONS : (a) A says: "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further. (b) But if A says: "I do not believe what Z asserted at that trial because I know him to be a man without veracity." A is not within this exception, inasmuch as the opinion, which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

SIXTH EXCEPTION : It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

ILLUSTRATIONS : (a) A person who publishes a book, a person who makes a speech in public and an actor or singer who appears on a public stage, submit respectively their book, speech or acting or signing to the judgment of the public. (b) A says of a book published by Z--"Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind" A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further, (c) But if A says : "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

SEVENTH EXCEPTION : It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

ILLUSTRATIONS : (a) A Judge censuring in good faith the conduct of a witness, or of an officer of the Court ; a head of a department censuring in good faith those who are under his orders ;

a parent censuring in good faith a child in the presence of other children; a school master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils ; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier ; of his bank for the conduct of such cashier as such cashier--are within this exception.

EIGHTH EXCEPTION : It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

ILLUSTRATIONS : If A in good faith accuses Z before a Magistrate ; if A in good faith complains of the conduct of Z, a servant, to Z's master ; if A in good faith complains of the conduct of Z, a child, to Z's father--A is within this exception.

NINTH EXCEPTION : It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

ILLUSTRATIONS : (a) A, a shopkeeper, says to B, who manages his business--"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests. (b) A, a Magistrate, in making a report to his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception.

TENTH EXCEPTION : It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the food of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

(Punishment : two years or fine or both).

Q. 94. What are the immunities of Judges, counsel and witnesses with regard to defamatory statements ?

Ans. JUDGE : Section 77 of the Pakistan Penal Code lays down that nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law. Illustration to Exception 7 of Section 499, P.P.C. quoted in answer to the previous question protects a Judge censuring in good faith the conduct of a witness, or of an officer of the Court. An action for defamation cannot be maintained against a Judge for words used by him whilst trying a case in Court, even though such words are alleged to be

false, malicious, and without reasonable cause. The rule is based on the principle that if such an action were to lie the Judges would lose their independence, which is very essential for the administration of Justice.

COUNSEL : It has been held that the immunity which a counsel enjoys in a criminal proceeding for words uttered or written in the performance of his function as counsel is not in the nature of an absolute but of a qualified privilege under Section 499, Exception 9, P.P.C., and it is for the prosecution to prove absence of good faith. The Court will presume good faith unless there is cogent proof to the contrary. For example, the counsel loses the defence of Exception 9 to Section 499 if he abuses his position and makes the allegations maliciously or for his own purpose. If the allegations are made honestly and in discharge of his duty to his client, he cannot be convicted. One High Court has held that even the presence of malice will not override the presumption of good faith, when the statement made was obviously necessary in the interest of the client.

WITNESS : The statement of a witness is not absolutely privileged but is governed by the provisions of Section 499. According to one High Court if the statement is irrelevant, and the witness being actuated by malicious motives injures the reputation of another, he commits an offence under Section 499. But if the statement is relevant to the injury no prosecution would lie. Another High Court is of the view that statements of witnesses made in the witness-box are absolutely privileged and if they are false the remedy is by indictment for perjury and not for defamation.

CHAPTER XXI

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

(Sections 503-510)

Q. 95. What is meant by Criminal intimidation ? Is it an offence? If so, what punishment is provided for this offence?

Ans. CRIMINAL INTIMIDATION : Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause harm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

EXPLANATION : A threat, to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

ILLUSTRATION : A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

Criminal intimidation is closely analogous to extortion. In extortion the immediate purpose is obtaining money or money's worth; in criminal intimidation, the immediate purpose is to induce the person threatened to do or abstain from doing something which he was not legally bound to do or omit.

INGREDIENTS : Section 503 has the following essentials : --

1. Threatening a person with any injury:--

- (a) to his person, reputation, or property; or
- (b) to the person or reputation of any one in whom that person is interested.

2. Threat must be with intent:--

- (a) to cause harm to that person, or
- (b) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
- (c) to cause that person to omit to do any act which he is not legally bound to do as the means of avoiding the execution of such threat.

PUNISHMENT FOR CRIMINAL INTIMIDATION :

Whoever commences the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

IF THREAT TO BE CAUSED DEATH FOR GRIEVOUS HURT, ETC. : And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Section 506 punishes for the offence of criminal intimidation defined under Section 503. In certain circumstances mentioned in the section the punishment is greater.

The accused were elderly persons of sufficiently advanced ages of 70/72 years and matter proceed no further than verbal criminal intimidation. Sentence of 25 years rigorous imprisonment already undergone by accused, was sufficient to meet ends, of justice, in circumstances.

Where the statement of complainant against whom no enmity was alleged by the accused fully corroborated by independent prosecution witnesses and no misreading of evidence or other material irregularities in judgment of lower Courts was pointed out. Their conviction and sentence were maintained in circumstances.

Q. 96. State the provisions of the Code with regard to insult offered to persons other than public servants?

Ans. INSULT TO PERSONS OTHER THAN PUBLIC SERVANTS : The Pakistan Penal Code provides the following two provisions relating to insult offered to persons other than public servants.

(a) Intentional insult with intent to provoke a breach of the peace, or to cause the commission of any offence - Two years or fine or both. (S. 504). (b) Uttering any word, or making any sound or gesture, or exhibiting any object, intending to insult the modesty of a woman or intruding upon the privacy of a woman. (One year, or fine or both.) (S. 509).

Other provisions relating to insult are : (i) injuring or defiling any place of worship with intent to insult the religion of any class. (S. 205) ; (ii) insulting the religion or religious feelings of any class (S. 295-A) ; and (iii) criminal trespass with intent to intimidate, insult or annoy a person in possession of property (S. 411), besides intentional insult to a public servant sitting in judicial proceeding. (S. 228).

CHAPTER XXII

OF ATTEMPTS TO COMMIT OFFENCES

(Section 511)

Q. 97. How far are attempts to commit offences punishable under Section 511 of the Pakistan Penal Code? What must be proved in order to support the conviction of an attempt under this section?

Ans. ATTEMPTS TO COMMIT OFFENCES : Section 511 lays down that "whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, with such fine as provided for the offence, or with both.

The points which require proof under the above section are : (1) that the accused attempted to commit some offence punishable with imprisonment for life or imprisonment ; or that he attempted to cause such an offence to be committed ; and (2) that in attempting to do the above act he did some act towards the commission of the offence.

ILLUSTRATIONS : (a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under the above section. (b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence Z's having nothing in his pocket. A is guilty of an offence under the above section.

HUDOOD LAWS, 1979

Offences Against Property (Enforcement of Hudood) Ordinance, (VI of 1979)

Q. 1. Who is an Adult according to the Ordinance ?

Ans. "ADULT" : Adult means a person who has completed 18 years of age and in case of female a person who has either attained the age of 16 years or has attained puberty. Puberty is presumed in the absence of evidence on completion of the age of 15 years, but it may be attained earlier.

Q. 2. What do you understand by the term "Hadd"?

Ans. The literal meaning of *hadd* is measure or limit. In legal terminology, it means that punishment the limits of which have been defined and fixed in the *Qur'an* and *Hadith*. It relates to those crimes in which the right accrues to God alone, without any right accruing to humanity. The following crimes belong to this class:--

- (a) adultery ;
- (b) fornication ;
- (c) false accusation ;
- (d) apostasy ;
- (e) drinking wine ;
- (f) theft ; and
- (g) highway robbery.

Q. 3. Define "Hirz" and illustrate its kinds?

Ans. HIRZ : "Hirz" means not custody but arrangement made for custody of property. Thus property kept in a house, even though its doors may not be closed, or kept in a box or any container will be in "hirz". Similarly property kept in the custody of any person shall be in the "hirz" of such person.

Hirz is defined as an arrangement for the custody of the property. What custody can turn into *hirz* is explained in explanation to this definition. It is to the effect that property placed in a house, whether its door is closed or not or in an almirah or other container or in the custody of a person, whether he is paid for such a custody or not is said to be in '*hirz*'. Thus *hirz* does not mean only an enclosed area. It may include even an unenclosed open place provided the movable property placed there remains in the custody of either the owner or some other person.

In Fiqh there are two kinds of *hirz* (1) *Hirz bil Makan* () and (2) *Hirz bil Hafiz* (). The first is the enclosed area where none may enter without permission of the owner. The other *hirz* may be unenclosed or may be a place in which permission for entry may not be required, just as mosques, common roads and open places outside the city. Where property is stolen from such unprotected places the hand of the thief cannot be cut except in cases in which the watchman is near the property whether sleeping or awake or whether the property be under him or near him. This is borne out by the tradition of Safwan son of Omayya. The facts of that case are that Safwan was sleeping in a mosque with his mantle () under his head. The thief removed the mantle from under his head. He was immediately captured by Safwan who took him to the Holy Prophet. The Holy Prophet directed the hands of the thief to be cut. Safwan who appeared to have been struck with compassion said that he rather gifted the mantle to the thief. The Holy Prophet said this could have been done before he was brought to him. The sentence was therefore executed.

Q. 4. Explain the institution of 'Nisab' with reference to theft liable to 'Hadd'?

Ans. NISAB : Nisab for purposes of theft liable to *hadd* has been fixed at 4.457 grams of gold, or property of equivalent value, at the time of the commission of theft. If theft is committed from the same *hirz* not on one occasion but in more than one transactions or from several *hirzes* and the value of the property stolen in each of such transactions is less than 4.457 grams, such theft or thefts shall not be liable to *hadd* even if the value of the property stolen on all such occasions totally exceeds 4.457 grams.

One of ingredients of theft liable to "hadd" being valuation of stolen property being not less than value of 'Nasab', i.e., 4.457 grams of gold, burden lies on prosecution to lead some evidence, oral or documentary, to prove value of 4.457 grams of gold in terms of rupees as prevailing on date of commission of theft.

Q. 5. Define "Theft liable to Hadd." What punishments are provided for the offence?

Ans. THEFT LIABLE TO HADD:-

Theft liable to hadd is committed when--

- (1) The offender is an adult person ;
- (2) The offence is committed surreptitiously as explained below;
- (3) The property is removed from any *hirz* ;

- (4) The property is of the value of nisab, or more as explained below;
- (5) it is not stolen property as explained below;
- (6) The offender knows that the property is or is likely to be of the value of nisab or more:

Property criminally misappropriated or subject matter of criminal breach of trust fall outside the pale of stolen property.

According to explanation "stolen property" does not include property which had already been criminally misappropriated or in respect of which criminal breach of trust has been committed.

Surreptitiously according to explanation signifies that the person committing theft believes that the victim of theft is not aware of his action.

For surreptitiously removal of property, it is necessary that ;

- (i) it is day time-which includes one hour before sunrise and two hours after sun-set ;
- (ii) it should continue till completing of the offence ; and
- (iii) if, the theft is committed at night surreption need not be in a continuous manner.

Where theft was committed at 5 O' Clock an hour or more before the sunset by the accused who was an adult and took away the two jewellery sets from the *hirz* of the complainant's ship, of more than the value of 'nisab' theft was not committed surreptitiously.

Theft according to Pakistan Penal Code:--Theft has been defined in Section 378, Pakistan Penal Code, 1860 as under;

Whoever intending to take dishonestly, that any movable property out of the possession of that any person without persons concern, moves that property in order to such taking, is said to commit theft.

EXPLANATION 1 : A thing so long it is attached to earth, not being movable property is not the subject of theft ; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

EXPLANATION 2 : A moving effected by the same act which effects the service may be a theft.

EXPLANATION 3 : A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

EXPLANATION 4 : A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

EXPLANATION 5 : The concern mentioned in the definition may be expressed or implied, and may be given either by the person in possession or by any person having for that purpose authority either express or implied.

Punishment of theft liable to 'hadd'. The punishment for theft liable to 'hadd' shall be as follows:--

- (1) when offence is committed for the first time-- amputation of right hand from the joint of the wrist;
- (2) when committed for the second time. amputation of the left foot upto ankle ;
- (3) when committed for the third time or subsequently..... imprisonment for life i.e., till death.

Punishment in the first two cases shall be differed till it is confirmed by the Court to which appeal in such case would lie and the accused shall be kept in simple imprisonment during this period.

In the third case, however, when the accused has been sentenced to imprisonment for life and the Appellate Court feels satisfied that the accused is sincerely penitent, it may set him at liberty on such terms and conditions as it may impose.

Amputation shall be carried out only by an authorised Medical Officer personally. If however, such medical officer feels that amputation of hand or foot may cause death the execution of hadd shall be postponed till such time as the apprehension of death no longer exists.

If a party commits theft, and each of the party receives ten dirhams, the hand of each is to be cut off; but if they receive less than ten dirhams, they are not liable to amputation. Amputation is not incurred by the theft of anything of a trifling nature, such as wood, bamboos, grass, fish fowls and garden stuff. Amputation is not incurred by the theft of such things as quickly decay. and spoil, such as milk or fruit whilst upon the tree of grain which has not been reaped. These are not considered as in custody.

The hand of a thief is not cut off for stealing any fermented liquor, because fermented liquors are not lawful property. The hand is also not to be cut off for stealing a guitar or tabor, these being of use merely as idle amusements.

The hand is not to be cut off for stealing free born infant, although there are ornaments upon it, because a free person is not property. Again there is no amputation for stealing from the public treasury, because everything there is public property of all Muslims, and in which the thief, as a member of the community has a share. Similarly, if a person steals from property of which he is a part owner, amputation is not inflicted. Nor if a creditor steals from his debit is the hand cut off, provided the residue does not exceed the nisab.

The right hand of the thief is to be cut off at the joint of the wrist and the stump afterwards cauterised, and for the second theft the left foot, and for the third and beyond he must suffer imprisonment for life.

If a thief returns to the owner the stolen property before a complaint for his prosecution is made the hadd lapses. The things, which in the eye of Shariah cannot be the objects of property, such as where, instruments, if stolen exclude hadd. Same rule applies to things which owing to their holiness are not in commercio.

The stipulation of "taking away from custody" (hirz), excludes hadd if the thief is caught red-handed before he has been able to take the object out of the custody. The hadd punishment also excludes pecuniary liability. If, however, the object is still in existence it is returnable to the owner.

Q. 6. Give the cases in which 'Hadd' shall not be imposed?

Ans. 'Hadd' shall not be imposed in the following cases, namely:--

- (a) when the offender and victim of the theft are related to each other as--(i) spouses; (ii) ascendants, paternal or maternal; (iii) descendants, paternal or maternal; (iv) brothers or sisters of father or mother; or (v) brothers or sisters or their children;
- (b) when a guest has committed theft from the house of his host;
- (c) when a servant or employee has committed theft from the 'hirz' of his master or employer to which he is allowed access;
- (d) when the stolen property is wild-grass, fish bird, dog, pig, intoxicant, musical instrument or perishable foodstuffs for the preservation of which provision does not exist;

- (e) when the offender has a share in the stolen property the value of which after deduction of his share, is less than the 'nisab';
- (f) when a creditor steals his debtor's property the value of which after deduction of the amount due to him, is less than the 'nisab';
- (g) when the offender has committed theft under 'likrah' or 'iztrah'.

Q. 7. In which cases punishment of Hadd shall not be enforced under the Offences Against Property (Enforcement of Hadd) Ordinance, 1979?

Ans. CASES IN WHICH HADD SHALL NOT BE ENFORCED : (1) Hadd shall not be enforced in the following cases, namely :--

- (a) when theft is proved only by the confession of the convict but he retracts his confession before the execution of 'Hadd';
- (b) when theft is proved by testimony, but before the execution of 'hadd', any witness resiles from his testimony so as to reduce the number of eye-witnesses to less than two ;
- (c) when; before the execution of 'hadd' the victim withdraws his allegation of theft or states that the convict had made a false confession, or that any of the eye - witnesses have deposed falsely, and the number of eye-witnesses is thereby reduced to less than two, and
- (d) when the left hand or the left thumb or at least two fingers of the left hand or the right foot of the offender are either missing or entirely unserviceable.

(2) In the case mentioned in clause (a) of sub-section (1) the Court may order retrial.

(3) In a case mentioned in clause (b) or clause (c), or clause (d) of sub section (1), the Court may award 'tazir' on the basis of the evidence on record.

Q. 8. Define "Theft liable to Tazir". What punishment is provided for this offence?

Ans. THEFT LIABLE TO TAZIR : Whoever commits theft which is not liable to hadd' or for which proof is either of the forms mentioned in Section 7 is not available, or for which 'hadd' may not be imposed or enforced under this Ordinnce, shall be liable to Tazir.

THEFT LIABLE TO TAZIR : When the accused voluntarily made judicial confession and further led to discovery of stolen property, conviction recorded on plea of guilty of accused was held to be justified in view of provisions of Section 265-E, Cr.P.C.

TAZIR PUNISHMENT : Where the confession had been on the one hand found inadmissible and on the other hand not voluntary and truthful to coincide with the facts of the case, Court considered it safe to rule out the retracted confession from consideration for Tazir punishment and necessarily it could not be used as circumstantial evidence as against the co-accused.

PUNISHMENT FOR THEFT LIABLE TO TAZIR : According to Section 14, whoever commits theft liable to 'tazir' shall be awarded the punishment provided for the offence of theft in the Pakistan Penal Code. The punishment provided in the Penal Code for the offence of theft as given in Section 379 is imprisonment of either description for a term which may extend to three years, or with fine, or with both. The same punishment shall be awarded under this section of the Ordinance if it is case of simple theft. If, however, theft is committed in a dwelling house the punishment may extend upto seven years imprisonment and fine, *vide* Section 380.

None of witnesses, saw accused actually entering "Hirz" and accused and stolen bullock were seen outside house. None of accused found to have been actually seen entering bullock "Hirz", not possible to sustain conviction under Section 9 and offence not liable to "Hadd" but accused having been proved to have committed theft was, guilty of theft liable to Tazir under Section 14 of Ordinance read with Section 380 of the Penal Code, 1860.

Quashing of proceedings : The wife filed suit for dissolution of marriage against the husband who avoided service of summons and in order to counteract, filed a direct complaint against the petitioners including his wife for offence under Section 14 of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979. The case was brought on regular file and bailable warrants were issued against the wife and petitioners. The petitioners including wife were issued against the wife and petitioners. The petitioners including wife had filed application for quashing of such proceedings against them. The record showed that complaint against the petitioners. Including wife was filed with a view to putting pressure upon them so that wife could not pursue suit for dissolution of marriage filed by her against the husband. The complaint showed that alleged incident took place three years prior to filing of complaint and that too after wife had filed suit for dissolution of marriage. The Magistrate took cognizance against the wife and other petitioners on the complaint

which on face of it appeared to be frivolous. Matrimonial dispute was in fact turned into criminal prosecution which in fact amounted to abuse of process of law. The High Court accepting application, quashed proceedings pending against the petitioners and wife under Section 14 of the Ordinance, 1979.

F.I.R. was lodged after about five months of the alleged incident. The contention that no person possessed of his senses would commit theft of moth eaten doors bying in the form of junk valued at about Rs. 50 only had force. The allegation made against the accused even if taken on the face value and accepted in their entirety would not constitute an offence in view of Section 95, P.P.C. as the law does not concern itself with matters too trivial to demand its notice. The proceedings pending against the accused in the Court of Magistrate were quashed in circumstances.

Plea of valid marriage by the accused : The marriage admitted by abductee in her statement under Section 164, Cr.P.C. Nikah Registrar registering earlier marriage of abductee registered at earlier serial number in Register produced in Court. Question of validity of marriage pending decision before the Family Court. The accused was allowed bail in circumstances.

Q. 9. What does the term "Haraabah" mean, how it is proved and punished ?

Ans. HARAABAH : When a person or persons, armed or not armed, make a show of force for taking away the property of another and attack him, or cause wrongful restraint, or put him in fear of death or hurt. Such persons commit the offence of *haraabah*. The offence partakes of and resembles the offence of robbery, dacoity and extortion as defined in Penal Code but it is not exactly the same.

The offence is required to be proved in the same manner as the offence of theft liable to *hadd* described in Section 7.

This section prescribes the punishment for the offence of *haraabah* in its various forms. The ingredients of the section are--

- A.** (1) Accused an adult; (2) found guilty of *haraabah* ;
 (3) neither murder committed nor any property taken away ;
 (4) punishment; • whipping extending to 30 stripes and rigorous imprisonment for so long as the Court is satisfied that the convict is sincerely pertinent ;
 (5) sentence of imprisonment in no case to be less than 3 years.
- B.** (1) Accused an adult ; (2) found guilty of *haraabah* ;
 (3) no property taken away but hurt caused ;

(4) punishment of whipping extending to 30 stripes and rigorous imprisonment plus punishment for causing hurt liable to be conflicted under any law for the time being in force.

C. (1) Accused an adult ; (2) found guilty of *haraabah* ;

(3) no murder committed but property valuing or exceeding nisab taken away ;

(4) Punishment; amputation of right hand from wrist and left foot from ankle.

D. (1) Accused adult ; (2) found guilty of *haraabah* ;

(3) offence committed conjointly by more than one person ;

(4) Punishment ; amputation to be imposed only when value of share of each accused not less than *nisab*.

E. (1) Accused adult ; (2) found guilty of *haraabah* ;

(3) murder committed in course of offence ;

(4) Punishment ; death imposed as *hadd*.

If the left hand or the right foot of the offender is missing or is entirely unserviceable the other hand and foot, as the case may be, shall not be amputated and the offender shall be punished with rigorous imprisonment for a term which may extend to 14 years conviction with whipping which shall not exceed 30 stripes.

Punishment for *haraabah* in the course of which no murder had been committed but property valuing or exceeding *nisab* has been taken away, except when the left hand or the right foot of the offender is missing or when murder, has been committed in the cause of *haraabah*, shall not be executed unless it is confirmed by the Court to which an appeal has from the order of conviction and during pendency of confirmation of sentence other offender shall be kept in simple imprisonment. Amputation shall be carried out by an authorised Medical Officer but if it is apprehended by such officer that death may cause as a result of such operation, the execution of operation shall be postponed till such time as the apprehension of death disappears.

Robbery and Haraabah : As robbery is an aggravated form of theft, *haraabah* is also an aggravated form of *saraka*.

However, the term *haraabah*--often used in place of robbery--seems to be more wider than the term robbery. We may say that the *haraabah* occupies a middle place between the offence of robbery, dacoity and extortion but again it is not exactly the same. Following points of distinction may be found in robbery and *haraabah*:

- (1) In *haraaba*, the offender must attack the person while in robbery it is not a necessary ingredient.
- (2) In robbery mere producing a fear of instant death or hurt is enough but in *haraabah* the offender must cause actual harm in the shape of hurt, death or wrongful constraint;
- (3) The punishment in case of *haraabah* is *hadd* if and while committing the offence the person cause a harm which itself is liable to *hadd*. For instance, if he takes a property exceeding the value of *nisab* he would be liable to *hadd*.
- (4) In identical manner, persons of tender or juvenile age can be punished for robbery but to attract the punishment of *haraabah* as provided in Section 17 of the Ordinance, the accused should be an adult.

Q. 10. What is "Rassagiri" or "Patharidari" and how it is punished?

Ans. Whoever, commits *haraabah* which is not liable to the punishment provided for in Section 17, or for which proof in either of the forms mentioned in Section 7 is not available, or for which punishment of amputation or death may not be imposed or enforced under this Ordinance, shall be awarded the punishment provided in the Pakistan Penal Code (Act XLV of 1860) for the offence of dacoity, robbery or extortion, as the case may be.

(1) Whoever extends patronage, protection or assistance in any form to, or harbours, any person or group of persons engaged in the theft of cattle, on the understanding that he shall receive one or more of the cattle in respect of which the offence is committed, or a share in the proceeds thereof, is said to commit "Rassagiri" or "Patharidari".

(2) Whoever commits "Rassagiri" or "Patharidari" shall be punished with rigorous imprisonment for a term which may extend to fourteen years, or with whipping not exceeding seventy stripes, and with confiscation of all his immovable property and with fine.

OFFENCE OF ZINA

(Enforcement of Hudood)
Ordinance (VII of 1979)

Q. 1. Define Hadd, Tazir and Muhsan ?

Ans. HADD : Hadd used to be prevalent in Arabia at the time of the promulgation of Islam, and the Islamic Law, while confirming it as the extreme punishment of certain crimes, has laid down conditions of a stringent nature under which such punishments may be inflicted. These rules are so strict and inflexible that it must be only in rare cases that the infliction of hadd as of retaliation would be possible, and in fact; there are only a few instances known in which Hadd has been inflicted. The department of the law relating to Hadd has merely a historical interest and is typically illustrative of the principle of Islamic jurisprudence, namely, not to interfere with the customs and usages of the people in such matters except so far as it may be necessary to safeguard against abuses and oppression and to let the new principle take the place of the old rule slowly and alongwith the advance of public opinion.

Punishment by way of Hadd are of the following forms:--

Death by stoning, amputation of a limb or limbs, flogging by hundred or eighty strikes. They are prescribed respectively for the following offences:--

Whoredom, theft, highway robbery, drunkenness, and slander imputing unchastity.

Some of the more important limitations and conditions under which the Islamic law allows the infliction of this form of punishment. The principle underlying them is that any doubt, would be sufficient to prevent the imposition of Hadd. For instance, such doubt may arise from the nature of authority applicable to the facts of a particular case or from the character to the evidence or from the state of mind of the accused person, that is, his knowledge of the law as facts, or the state of his will at the time of commission of the offence charged against him. If there be a show of authority, though not of sound character against the accepted law which declares a particular act to be punishable with Hadd, this is treated as a doubt sufficient to prevent the imposition of such a sentence, even if the accused himself did not entertain any doubt on the point. This is called error or doubt with respect to the subject of the application of law (shubhatul'-mahal) Even when an offender misconceived the law in a case where there is no foundation for such misconception, but he actually believed that what he was doing was not an offence, the sentence of Hadd will not be enforced against him. This is called doubt or error with respect to the act Shubhat-al-fail.

In certain cases such as an offence of whoredom, some jurists go so far as to recommend to a man who has seen it committed not to give information or evidence, though if he chooses to do so his testimony will be admitted, provided he possesses the qualification of a witness. It may mention that the policy of law in connection with this offence is to punish only those offenders who defy public decency and openly flaunt their vices. Hence it is, that four male eye-witnesses are required for its proof. Even if they are forthcoming which is hardly to be expected, the Magistrate is asked to scrutinize their testimony closing in order to see if they are not mistaken, and to allow them to retract what they have deposed to. Further more, if there has been any delay in the witnesses coming forward and giving their evidence, that circumstance in itself is held sufficient to raise a doubt.

TAZIR : The literal meaning of ta'zir is to punish. Tazir in its primitive sense, means prohibition and also instruction; in law it signifies an infliction undermined in its degree by the law, on account of the right either of God, or of the individual, and the occasion of it is any offence for which hadd has not been appointed, whether that offence consists in word or deed.

Tazir may be inflicted by imposition of fine, scourging, imprisonment, etc. It is the punishment which is left to the discretion of the Qazi or judge.

As such Ta'zir is a punishment left to the Ruler of the Head of State in his discretion in a case not covered by Hadd. However, it is not open to a Ruler or the Head of the State to tag on the punishment of Hadd with a further punishment by way of Ta'zir.

The following punishments for crime other than dealt with as Hudood, are included in ta'zir. One or more punishments are awarded as deemed proper and necessary by a Qazi, looking to the nature and extent of the crime and its circumstances. The Ta'zir (s) are:

- (1) Slapping.
- (2) Lashing or flogging stripes (not more than 39 i.e., less than the lowest number prescribed as Hadd for a slave).
- (3) Externment, exilement.
- (4) Imprisonment, which is Islamic Law is a coercive measure aiming at producing repentance (*tawbah*).
- (5) Public proclamation of the convict on a donkey's back Tashhir.
- (6) Admonition or reprimand.

- (7) Punishment of abandonment.
- (8) Zaman (compensation) payable to the aggrieved person, in case of loss of property.
- (9) Diyat (money compensation).
- (10) Suspension or dismissal, and lastly.
- (11) Death penalty.

Ta'zir can also be inflicted by the Qazi in a crime punishable with Hadd, which is not proved strictly, such as for having not proved adultery by production the requisite number of four eye witnesses.

"MUHSAN":- Means--

- (i) A Muslim adult man who is not insane and has had sexual intercourse with a Muslim adult who, at the time, he had sexual intercourse with her, was married to him and was not insane; or
- (ii) a Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man who at the time she had sexual intercourse with him, was married to her and was not insane;

Muhsan is then, a person who is, (1), Muslim; (2) adult ; (3) not insane (4) has had sexual intercourse with a same Muslim adult man/woman; and (5) had been married to him/her as such him.

Person proved to have committed intercourse with a person other than lawful spouse is not Muhsan offence is Zina having not been proved against appellant he was a muhsan.

Q. 2. Explain the term "Zina" as defined in the Ordinance?

Ans. ZINA : When a man and a woman who are not validly married to each other wilfully commit sexual intercourse, they shall be deemed to have committed the offence of Zina. Zina is thus a wider term and includes both fornication and adultery but the punishments prescribed for them are different. Adultery implies subsistence of marriage between the parties while fornication implies both parties being not married together. Consent is immaterial in such cases. The offence is highly deprecated and Muslims are forbidden from indulgence in such a foul act.

Q. 3. Define 'Zina Bil Jabr'. What punishment is provided in Offences of Zina (Enforcement of Hadd) Ordinance, 1979 for this offence?

Ans. ZINA-BIL-JABR : (1) A person is said to commit Zina-bil-Jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: --

- (a) against the will of the victim;
- (b) without the consent of the victim;
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

EXPLANATION : Penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina-bil-Jabr.

(2) Zina-bil-Jabr is liable to Hadd if it is committed in the circumstances specified in sub-section (1) of Section 5.

(3) Whoever is guilty of Zina-bil-Jabr liable to Hadd shall subject to the provisions of this Ordinance,--

- (a) if he or she is not Muhsan, be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the Court may deem fit having regard to the circumstances of the case.

(4) No punishment under sub-section (3) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies ; and if the punishment be of whipping, until it is confirmed and executed, the convict shall be dealt within the same manner as if sentenced to simple imprisonment.

ZINA-BIL-JABR : When either a man or a woman, not validly married together commits Zina against the wish or without the consent of either or by obtaining consent knowing that victim has given consent in the belief that the offender is validly married to him or her, the offence of Zina-bil-Jabr shall be constituted.

This offence would be liable to Hadd in the same circumstances in which the offence of Zina is liable to Hadd, *vide*

Section 5. Person guilty of Zina-bil-Jabr shall be stoned to death publically if he/she is a Muhsan or with whipping numbering one hundred stripes, at a public place and with such other punishment including sentence of death as the Court may deem fit in circumstances of the case if he or she is not a Muhsan.

Provision of sentence of "rajam" (stoning to death) as 'Hadd' in Sections 5 and 6 of Ordinance VII of 1979 is repugnant to injunction of Islam and infliction of one hundred stripes alone constitutes 'Hadd'.

Man and woman marrying in good faith and believing themselves to be married. Benefit of doubt has to go them. Principle of benefits of doubt is prevailing principle of criminal law in Islam. No reason, held, to refuse to extend such principle to the case of Tazir.

USE OF FORCE : Injuries suffered by prosecutrix not only caused from the blunt side of the weapon but also that the offender used minimum force which caused insignificant injuries with width of only. Thus, the force used by the accused was only to subdue the victim and not with a view to take any revenge or cause her extraordinary injuries. The second point would be illustrated by taking into consideration some possible aggravations in the circumstances of the present case. One, if the victim remaining the same the appellant would on account of a previous enmity had taken a revenge against the victim or against her relations and in that connection would have caused graver bodily harm with any weapon of offence, the offence would then have been much graver and it might have required the imposition of a very heavy sentence of imprisonment may be the highest one. Another example can also be visualised. If a female child of tender age who was not used to sexual intercourse would have been violated, destroying her virginity, making her more miserable as compared to others, the culprit would have deserved much harsher punishment and may be again the highest one. But there may be a third case. The example can be cited of a grown up woman including a married woman or a woman who not being married is used to sexual intercourse exhibiting unguarded conduct; say, she behaves in such a manner as to create misunderstanding, without her meaning so, that she is in an inviting mood and a foolish person then commits the offence of Zina-bil-Jabr. It would be Zina-bil-Jabr because, in the meanwhile, the woman realising her folly resists the immoral and unlawful approach by the culprit. In that eventuality the culprit might not deserve that much harsh treatment in matter of sentence of rigorous imprisonment as is visualised in the aforementioned two examples. This very example can be visualised in other facts also. Such a case does not fall within the category of the grievest ones under Section 13 (3).

RUPTURE OF HYMAN : Rupture of hyman is not the results of coitus only as stated in the Modi's Medical Jurisprudence and Toxicology, 22nd Edition, P. 33. Rupture may be caused by an accident, for example, a projecting substance, fence or while playing at see-saw, introduction of instruments by medical practitioner, etc. And it is also strange that in the first act of coitus, if any no further injury was caused to the girl although the vagina did not fully admit two fingers easily and the posterior was torn only in this occurrence.

Medical evidence showing victim's hyman being torn and bleeding. Guilty held proved.

MARKS OF INJURIES : Injuries on the body of the prosecutrix found self-inflicted on faked to make out a case of Zina-bil-Jabr. The benefit of doubt in the circumstances goes to the accused at least to the extent that it cannot be held to be a case of Zina-bil-Jabr.

No mark of injury or any other sign of rape is found on the person of prosecutrix in her medical examination. Accused however apprehended on the spot. Prosecutrix a married woman of 35 years age. Bruises if received held would have disappeared after about three days when medically examined. Plea of consent not accepted.

A mark of violence found on person of victim girl. Conduct of the accused leaving necessary ingredients of Section 11, Act of the accused could have been one of rescuing complainant from clutches of other. Conviction set aside.

SENTENCE OF RAJAM, PROVIDED IN SECTIONS 5 AND 6 OF ORDINANCE IS IN ACCORDANCE WITH QUR'AN AND SUNNAH : The expression "injunction of Islam" is a comprehensive one which will include all injunctions of Islam of every school of thought and sect etc., but Article 203-D of the Constitution has restricted its meaning and application and confined it to only two sources for which no Muslim can have any valid objection. These sources are (a) the Holy Qur'an and (b) the Sunnah of the Holy Prophet (p.b.u.h.). The Holy Qur'an is the direct word of God received to the Holy Prophet (p.b.u.h) whereas the word "Sunnah" has been used in the Holy Qur'an in different senses. The literary dictionary meaning of the word "Sunnah" is way, course, rule, mode of manner of acting or conduct or the life or the like. Thus the Sunnah can be of Allah or of his Holy Prophet (p.b.u.h) or the Caliph of Holy Prophet (p.b.u.h.) and the Companions (p.b.u.h.) in Article 203-D Constitution of Pakistan 1973, we are concerned only with the "Sunnah" of the Holy Prophet (p.b.u.h). In other words the way or mode of life adopted by the Holy Prophet (p.b.u.h) and his sayings and deeds would constitute his Sunnah.

FRAMING OF CHARGE : A person cannot be convicted of a greater offence than the one charged though *vice versa* is permissible. Confession of the accused under Section 6 (3) must conform to the requirement laid down in Section 5 (1) of the Zina Ordinance, 1979. Confession if retracted even if it be extra-judicial would not entail conviction under the Hudood Laws.

PUNISHMENT FOR ZINA OR ZINA-BIL-JABR WHERE CONVICT IS NOT AN ADULT : A person guilty of Zina or Zina-bil-Jabr shall, if he is not an adult, be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both, and may also be awarded punishment of whipping not exceeding thirty stripes:

Provided that in the case of Zina-bil-jabr, if the offender is not under the age of fifteen years ; the punishment of whipping shall be awarded with or without any other punishment.

OFFENCE OF ZINA : According to medical evidence prosecutrix not subjected to recent assault, no semen on person or clothes of the accused. Commission of offence not provable. The accused 18 years no evidence of ejaculation, no proof that he was adult, accused entitled to benefit of Section 7. In the presence of valid marriage and the prosecutrix being puber no offence of zina can be said to be constituted. Ordinarily assertion of a major woman and man that they had been living as husband and wife would be sufficient to establish factum of their legally married unless there is anything to the contrary on record. Such a spouses cannot be convicted on the plea that they were unable to prove nikahnama when there is nothing on record to suggest that they had committed zina.

PUNISHMENT OF ZINA OR ZINA-BIL-JABR WHERE CONVICT IS NOT ADULT : In the case of 'Zina' or 'Zina-bil-jabr', if the guilty person is not an adult, he shall be punished with imprisonment of either description for a term which may extend to five years or with fine, or with both and may also be awarded sentence of whipping shall be awarded with or without any other punishment.

Victim has sustained multiple abraisons on different parts of her body and her hymn also showed fresh tears edges were red, tender, swollen, bleeding and vagina was also painful. Victim was subjected to Zina-bil-jabr and not Zina with consent.

The accused at the time of commission of offence was found about 14 years of age. Case of the accused therefore, fell under Section 7 and not under Section 10 (3) of the Ordinance. Sentence of 15 years R.I. and 30 stripes was accordingly set aside and the accused was sentenced to two and a half years R.I.

The accused being under the age of 15 years was not adult and was thus awarded sentence of imprisonment as well as fine by the Trial Court but not whipping. Sentence of the accused was reduced from 5 years to two years and fine increased from Rupees five thousand to Rupees ten thousand by the Federal Shariat Court.

A mere assertion of being non-pubert by the accused in his statement under Section 342. Criminal Procedure Code, without a positive attempt on behalf of the accused to substantiate the allegation could not be sufficient. He should have demanded the examination of his person by a Medical Expert on this point in order to bring the offence under the purview of Section 7 of the Ordinance.

Accused though a minor between 12 and 14 years of age yet proved to have committed Zina-bil-Jabr with a girl of 6 years of age. Court not feeling inclined to send him to prison but in view of the facts and circumstances of case feeling ends of justice to be met by enhancing fine Rs. 500 to Rs. 8,000 or in default to undergo 2 years R.I. plus 30 stripes.

The accused was aged under 15 years. Doctor did not carry out examination regarding ejaculation of the accused to assertion if he had attained the symptoms of puberty. Benefit of doubt extended to the accused on the ground that he might not be an adult, but such fact by itself would not be sufficient to negate and rebut the Chemical Examiner's evidence on the factum of sexual act having been performed with the victim.

ZINA WITH A DEAD PERSON OR A PERSON ASLEEP
: When a person satisfies his lust on a dead body he can be held guilty of Zina-bil-Jabr as defined in Section 6 of the Ordinance. Duration of sleep being a period of temporary death, if sexual intercourse is done with a woman who is asleep or unconscious it will amount to Zina.

QUASHING OF PROCEEDINGS : The petitioners lodged case of abduction. During the investigation allegations were found false and case was cancelled. Subsequently on the report of the Station House Officer of Police Station were alleged and abuse of process of Court. Proceedings were quashed.

Q. 4. What punishment is awarded to the accused committing Zina-bil-jabr if not an adult?

Ans. PUNISHMENT : In the case of zina or 'Zina'bil-Jabr, if the guilty person is not an adult, he shall be punished with imprisonment of either description for a term which may extend to five years or with fine, or with both and may also be awarded sentence of whipping not exceeding 30 stripes.

If the person guilty of 'Zina-bil-Jabr' is not under the age of 15 years the punishment of whipping shall be awarded with or without any other punishment.

Q. 5. What proof is required to prove a charge of Zina or Zina-bil-jabr to Hadd? Define Zina liable to Hadd.

Ans. PROOF OF ZINA OR ZINA-BIL-JABR LIABLE TO HADD. According to Section 8 proof of Zina or Zina-bil-jabr liable to Hadd shall be in one of the following forms, namely:--

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
- (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah-al-Shuhood; that they are truthful persons and abstain from major sins (Khabir), give evidence as eye-witnesses of the act of penetration necessary to the offence:

Provided that, if the accused is a non-Muslim, the eye witnesses may be non-Muslims.

EXPLANATION : In this section "tazkiyah-al-shuhood" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of witnesses.

PROOF OF ZINA-BIL-JABR TO HADD : This section states that the offences of Zina and Zina-bil-Jabr' both liable to Hadd shall be proved either by the confession of the accused made before a Court of competent jurisdiction or by a Muslim adult male witness subject to their being found truthful person abstaining from major sins on 'tazkiyal-ul-shuhood. The witnesses have also to state that they were eye-witnesses of the penetration necessary to the offence. If the accused is a non-Muslim the eye-witnesses may be non-Muslims.

Zina-bil-jabr is liable to Hadd and it require Qur'anic proof for Qur'anic punishment.

Benefit of doubt : Principle of benefit of doubt is the prevailing principle of the Criminal Law hence there is no reason why it should not extend to case of Tazir.

Where a man and woman married in good faith and believed themselves to be married indulging in sexual intercourse would not be punishable and they will be given benefit of doubt and acquitted of the charge of committing Zina.

"Occurrences" could not be stretched and continued, the point when alleged thief was seen caught by alleged prosecution witnesses, with stolen property lying nearby.

Scheme of Sections 8, 9 and 10 : Section 9 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, empowers the Court, in case qualitative and numerical requirements are in fact reduced, or found lacking, before Hadd or part of it is yet to be enforced, to order retrial in one specified category of cases and to proceed to award Tazir on the basis of the evidence on record in the other category of cases. In the case of Tazir under Section 9, the evidence is qualitatively though not numerically, of the same description as is provided in Section 8 of the Ordinance. The same scheme should be taken to have been continued in Section 8 is applied to Tazir under Section 10 of the Ordinance, the testimony of a female (Lady Doctor) in cases under sections will not be admissible nor that of the prosecutrix, a female accomplice. Short of this evidence there would be left no case at all against the accused and he would be entitled to clean acquittal. Section 8 deals with proof of Zina or Zina-bil-jabr liable to Hadd. It requires the Qur'anic proof for a Qur'anic punishment. Section 9 deals with an altogether exceptional situation. It is of a trial taking place and full proof of the offence forthcoming to fulfil the requirements of Section 8 but before Hadd or any part of it is enforced, the proof as required under Section 8 but before Hadd or any part of it is enforced, the proof as required under Section 8 becoming deficient or not available, then depending upon the reason or nature of deficiency either remand or conviction and sentence under Tazir is to follow. Section 9, therefore, carries the requirements of proof prescribed under Section 8 to a stage beyond the conclusion of the trial to the enforcement of the Hadd itself. Thus the Court in proceedings under Section 8 does not, in view of Section 9 become *functus officio* till the Hadd itself has been fully enforced. The express words of Section 10 bring it into force and effect anywhere the qualitative and numerical requirements of mode, of proof prescribed in Section 8 is not forthcoming. For example provisions of Section 10 have been subordinated to Section 7 (where convict is not an adult) and to no other section of the Ordinance. Then on its own words it comes into operation when, *inter alia*, proof is either of the forms mentioned in Section 8 is not available." One of the forms of proof prescribed under Section 8 is of there being "at least four Muslim adult male witnesses about whom the Court is satisfied having regard to the requirements of 'tazkiyah-al-shuhood' that they are truthful persons and abstain from major sins (Khabir) give evidence as eye-witnesses of the act of penetration necessary to the offence" The contention that there should be (i) four witnesses, (ii) They should be all Muslim male adults case of the accused being Muslim. (iii) Satisfy the requirements of lazkiya-ul-shahood, (iv) eye witnesses of the act

of penetration, would bring lack that qualitative and numerical requirements of Section 8 of the Ordinance while Section 10 deals with a situation where it is in fact deficient or wanting. Neither in its pristine nor in a truncated form of requirements with regard to proof prescribed in Section 8 can be imported as statutory requirements of proof under Section 10 of the Ordinance. As to the question that "which rule of evidence, in the absence of special, or Islamic rule of evidence should prevail or apply to a situation which has the professed object of bringing in conformity with the injunctions of Islam the law relating to the offence of Zina" The trial before the Sessions Judge under the Ordinance is in fact proceedings in Court. For this reason, the provisions of the Qanun-e-Shahadat shall apply except to the extent displaced to the extent noted above in proceedings under Sections 8 and 9 of the Ordinance. There being no such inhibition in Section 10 of the Ordinance, the provisions of the Qanun-e-Shahadat shall apply, and the requirement, qualitative and numerical, indicated in Sections 8 and 9 shall not govern or control Section 10 of the Ordinance. On the question, viz, the qualification of a witness, the quality of evidence and the number of witnesses required there are three specific provisions in Art. 3 of the Qanun-e-Shahadat. It follows that a female is as much qualified to appear as a witness in proceedings under Section 10 of the Ordinance as is a male.

ZINA LIABLE TO HADD : According to Section 5 Zina is liable to Hadd if--

- (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married ; or
- (b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be, married.

(2) Whoever is guilty of Zina liable to Hadd shall, subject to the provisions of this Ordinance,--

- (a) "if he or she is a Muhsan, be punished, at a public place; or
- (b) if he or she is not a Muhsan, be punished, at a public place, with whipping numbering one' hundred stripes.

(3) No punishment under sub-section (2) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies ; and if the punishment be a whipping, until it is confirmed and executed, the convict shall, be dealt with in the same manner as if sentenced to simple imprisonment.

Zina liable to Hadd is constituted when a same adult man/woman, not married together, indulge in sexual intercourse. The perpetrators of this crime if Muhsan shall be stoned to death and if not so, punished at a public place with whipping numbering one hundred strips. The punishment shall be subject to confirmation by the Court to which the order of conviction would be appealable and during the pendency of confirmation proceedings the offender shall be kept in simple confinement.

Vires of Sections 5 and 6 : Provisions of sentence of "rajam" (stoning to death) and Hadd and Sections 5 and 6 of Ordinance, VII of 1979 is repugnant to injunctions of Islam and infliction of one hundred stripes alone constitutes "Hadd." "Hadd" has been defined as punishment which has been fixed as right of Allah. According to Al-Mabsut 'Tazur' is not 'Hadd' for it is not fixed.

A. Yusuf Ali writes that 'Zina' includes sexual intercourse between a man and a woman not married to each other and that, therefore, it applies both to adultery (which implies that one or both of the parties are married to a person other than the ones concerned) and to fornication which, in its strict signification, implies that both parties are unmarried. He proceeds to state ; "Other sex offences are also punishable but this verse applies, strictly to 'Zina' as above defined. The plain unambiguous meaning of Sura 24:2 fully supports the view taken by A. Yusuf Ali. It may be mentioned here, that there is no other provision in the Qur'an for the punishment of 'Zina' committed by a free married person, whether man or woman. This is another reason for thinking that the verse applies to every " and " " irrespective of the fact whether he or she is married or not.

A girl accused of adultery did not admit to have ever been married to person alleged to be her husband but claimed to have lawfully entered into marriage with another accused alleged to be adulterer. Two versions existed with regard to Nikah; one being that of another accused. No opinion with regard to nikah of either male with accused girl could possibly be expressed at bail stage. Nikah of person alleged by prosecution to be real husband if ultimately not proved at trial, sending back of girl to her father may amount to forcing girl to live with such person who may even have sexual intercourse with girl against her wishes. Proper course, in circumstances held, would not have been to impose condition on accused girl to be released on bail of her father but to enlarge her one surety of her own choice. Surety in such case ought to be pious man having means to prevent offence of enticing away woman with intent to have sexual intercourse with her.

Doctrine of doubt (shubha-fil-aqd) is duly recognised in Section 5 of Ordinance. Punishment of Hadd, can be avoided on ground of such doubt.

CONFESSION : Confession to be effective in a case under the Ordinance, 1979, must be competent to undertake that exercise. Any confessional statement recorded by a Magistrate would not be a confession and would have no legal effect.

Delay in lodging F.I.R.--Principle of Taqdeem--
Application : Taqdeem is applied by the Hanafi jurists to only three categories of Hadd punishment, i.e., punishment for adultery for drinking and for theft, since all these punishments pertain to matters concerned with the rights of Allah. The limitation is not applicable to the punishment of Qazi since it involves the rights of the people (Haqooqul Abad) According to Mijella, Section 1663 the lapse of time which prevents the pearing of actions is the lapse of time which had been taken place without excise. However, principle of Taqdeem cannot be adopted as a principle of limitation for reason of their being cases where mere delay may not be, objectively speaking, sufficient to give benefit of doubt to accused. In Islamic Fiqah delay in making a complaint in respect of penal offences is not favoured and particularly in respect of offences of Hudood it has been opined by the jurists that the delay in making the complaint is either because the complainant wanted to suppress the commission of the crime or that he was motivated by feelings of hatred. Where F.I.R. lodged about 10 years after occurrence the complaint is hit by principles of Taqdeem calling for dismissal of case.

Q. 6. What proof is required in case of Zina or Zina-bil-Jabr liable to Hadd? In which case punishment of Hadd shall not be enforced under. "The Offences of Zina (Enforcement of Hadd) Ordinance, 1979"?

Ans. PROOF OF ZINA OR ZINA-BIL-JABR LIABLE TO HADD : Proof of Zina or Zina-bil-Jabr liable to Hadd shall be in one of the following forms, namely:-

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or
- (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiah-al-shuhood, that they are truthful persons and abstain from major sins (Khabir) give evidence as eye-witnesses of the act of penetration necessary to the offence:

Provided that, if the accused is a non-Muslim, the eye witnesses may be non-Muslims.

EXPLANATION : In this section "tazkiah-al-shuhood" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

Section 8 states that the Offences of Zina and 'Zina-bil-Jabr' both liable to Hadd shall be proved either by the confession of the accused made before a Court of competent jurisdiction or by a Muslim adult male witness subject to their being found truthful person abstaining from major sins or tazkia-tus-shahud. The witnesses have also to state that they were eye-witnesses of the generation necessary to the offence. If the accused is a non-Muslim the eye-witnesses may be non-Muslims.

Zina-bil-Jabr is liable to Hadd and it requires Qur'anic proof for Qur'anic punishment.

Section 8 deals with proof of Zina or Zina-bil-Jabr liable to Hadd. It requires the Qur'anic proof for a Qur'anic punishment. Section 9 deals with an altogether exceptional situation. It is of a trial taking place and full proof of the offence forthcoming to fulfil the requirements of Section 8 but before Hadd or any part of it is enforced, the proof as required under Section 8 becoming deficiency either remand or conviction and sentence under Tazir is to follow. Section 9, therefore carries the requirements of proof prescribed under Section 8 to a stage beyond the conclusion of the trial to the enforcement of the Hadd itself. Thus, the Court in proceedings under Section 8 does not in view of Section 9, become *functus officio* till the Hadd itself has been fully enforced. The express words, of Section 10 bring it into force and effect only where the qualitative and numerical requirements of mode of proof prescribed in Section 8 is not forthcoming. For example, provisions of Section 10 have been subordinated to Section 7 (where convict is not an adult) and to no other Section of the Ordinance. Then on its own words it comes into operation when, *inter alia*, "proof is either of the forms mentioned in Section 8 is not available". One of the forms of proof prescribed under Section 8 is of there being "at least four Muslim adult male witnesses about whom the Court is satisfied having regard to the requirements of "tazkiyah-al-Shahood" that they are truthful persons and abstain from major sins (kabair) give evidence as eye-witnesses of the act of penetration necessary to the offence. The contention that there should be (i) four witnesses, (ii) they should be all Muslim male adults in case of the accused being Muslim (iii) satisfy the requirements of tazkiyah-ul-shahood (iv) eye-witnesses of the act of penetration, would bring back that qualitative and numerical requirement, of Section 8 of the Ordinance while Section 10 deals with a situation where it is in fact deficient or wanting. Neither in its pristine nor in a truncated form the requirements with regard to proof prescribed in Section 8 can be imported as statutory requirements of proof under Section 10 of the Ordinance. As to the

question that "which rule of evidence" in the absence of special or Islamic rule of evidence should prevail or apply to a situation which has the professed object of bringing in conformity with the injunctions of Islam the law relating to the offence of Zina". The trial before the Session Judge under the Ordinance is in fact proceedings in Court. For this reason the provisions of the Qanun-e-Shahadat shall apply except to the extent displaced by statute of equal or superior force. So far as the provisions of the Ordinance are concerned the provisions of the Qanun-e-Shahadat are displaced to the extent noted above in proceedings under Sections 8 and 9 of the Ordinance. There being no such inhibition in Section 10 of the Ordinance, the provisions of the Qanun-e-Shahadat shall apply, and the requirement, qualitative and numerical indicated in Sections 8 and 9 shall not govern or control Section 10 of the Ordinance. On the question, viz., the qualification of a witness the quality of evidence and the number of witnesses required there are three specific provisions in Art. 3 of the Qanun-e-Shahadat. It follows that a female is as much qualified to appear as a witness in proceedings under Section 10 of the Ordinance as is a male.

Cases in which Hadd shall not be enforced : Following are cases in which Hadd shall not be enforced:

- (1) In a case in which the offence of Zina or Zina-bil-jabr is proved only by the confession of the convict, Hadd, or such of it as is yet to be enforced, shall not be enforced if the convict retracts his confession before the Hadd or such part is enforced.
- (2) In a case in which the offence of Zina or Zina-bil-jabr is proved only by testimony, Hadd, or such part of it as it yet to be enforced, shall not be enforced if any witness resiles from his testimony before Hadd or such part is enforced, so as to reduce the number of eye-witnesses to less than four.
- (3) In the case mentioned in sub-section (1) the Court may order retrial.
- (4) In the case mentioned in sub-section (2), the Court may award Tazir on the basis of the evidence on record.

When the offence of Zina or 'Zina-bil-Jabr' is proved only by the confession of the offender, the Hadd shall not be enforced if because its execution the convict retracts his confession. In such case the Court may order retrial. When the offences are proved by testimony of witnesses and any witness resiles from his statement before enforcement of Hadd so that the number of witnesses is reduced to less than ten, the punishment by way of Hadd shall not be enforced but the accused may be awarded 'Tazir' on the basis of evidence on record.

"Wilful" or wilfully : The terms "wilful" and "wilfully" imply a conscious act of the mind and denote the attitude of the mind and will, but they import something more than a mere exercise of the will and include the idea of consciousness or knowledge, that is knowledge of all the circumstances and when used in connection with an act forbidden by law, the terms carry the idea that, with knowledge, the will consented to, designed and directed the act. The word "wilfully" used in Section 4 of Ordinance VII of 1979 means that there must be *mens-rea* or guilty mind guilty intention on the part of the accused, to convict him for the offence. Accused female contracting second marriage after getting talaqnama duly executed by her previous husband and attested by the Notary Public believing *bona fide* that it was a genuine document. No offence under Section 4 committed.

Judicial confession-Retracted : Could not be used against makers. Confession oral or in writing must be taken and considered as a whole including the inculpatory as well as exculpatory parts. Court is, however competent to believe any one part.

Trial Court having failed to retry appellants according to law after ignoring confession order of conviction passed despite retraction to be invalid in law.

Sentence : Although it is not established that the appellant No. 1 is a non-pubert but there is sufficient material on the record to indicate that he is a young person of tender age as against the co-accused who is a married woman having had three children from the wedlock. It would therefore not be unreasonable to believe that the accused must have played a dominant role in the affair. As far as the latter is concerned, she is a married woman who was left alone for full four years and deprived of the society of her husband during this long period. She could therefore very easily fall prey to the temptation of sin. It was precisely for this reason that Hazrat Umar (May God be pleased with him) issued standing orders to his commanders in the battlefields that no married personnel of the army should be allowed to remain absent from his home for a longer period than 3 months. Shariat does not recognize the above-stated excuse as a mitigating circumstance in enforcing "Hadd" on a culprit against whom the offence of Zina is proved by the evidence of the quality of the required Shariat standard. But this is not a case wherein the evidence of that quality is forthcoming. The offence is therefore to be dealt with as Zina not liable to "Hadd". This kind of offence, which essentially is created by the secular law of the country on the crimes would allow the consideration of all attending circumstances in fixing the quantum of punishment. The Court was of the view that ends of justice would meet if the sentences awarded to the accused appellants are reduced to 4 years R.I.

Case of the petitioner appearing to fall under Sections 11 and 9 read with Section 18 of the Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979), as neither actual rape on alleged victim proved nor any witness of actual rape available and statement of victim also not recorded. Offences being not punishable with imprisonment for ten years or more or with life imprisonment or death. Case, held, was not governed by bar of Section 497, Cr.P.C. and the cancellation of bail was declined.

Where confession in case of Offence of Zina is retracted the Court may order re-trial. Other eye-witnesses withdrawing their statements, reducing number of witnesses to less than four, Court, held, may award Tazir on the basis of evidence on record.

Section 9 (1) deals with a case where the Court seized of a Hadd offence only and the only evidence before the Court consists of confession or of four eye-witnesses Section, held, may not be applicable where no evidence exists for the purpose of Hadd apart from confession but evidence exists for convicting a person to Tazir offence.

Q. 7. Are provisions of this Ordinance applicable to non-Muslims?

Ans. APPLICATION TO NON-MUSLIMS : Hadd or Hudood Ordinance are all of them part of penal law of country and enforceable throughout country and applicable to all individuals irrespective of their caste, creed, or religion except such provisions as create certain exceptions in case of non-Muslims.

Law as laid down in Hudood Ordinance, does not allow any differential treatment in award of sentence of whipping to an accused for reason of his professing a religion different from Islam.

Q. 8. Are provisions of this Ordinance relating to offence of kidnapping different from those of the penal case?

Ans. There is marked difference exists between Sections 11 & 16 of Ordinance, VII of 1979 and Sections 362 & 498 at Penal Code, 1860. Provisions of Penal Code make no distinction between sexes of victims of offence of abduction and confines offence of enticing or taking away only against a married woman but Ordinance VII of 1979, creates such offences only against females. Possible though, a female to commit such offences against another female yet no abduction or enticing or taking away of a male person by a female offender could take place. Likewise it is not necessary under Ordinance for enticed woman to be married or of any particular age or status. Female accused held, cannot be held guilty of offence of abduction of a male person.

OFFENCE OF QAZF

(Enforcement of Hadd) Ordinance (VII of 1979)

Q. 1. What does the term "Qazf" mean?

Ans. QAZF : If a person accuses another of fornication or adultery, he is required to support his accusation by procuring four reliable witnesses. If he is unable to do so he is guilty of al-qadhif (false accusation of fornication or adultery), and his punishment is eighty lashes. He is also deprived of the right to act as a witness in the future. This is in conformity with the Qur'anic provision which states, "they who defame virtuous woman and bring not four witnesses, scourge them with fourscore stripes and receive be not their testimony for ever, for, these are perverse persons". (O. XXIV, 4). The jurists are agreed that a complaint in a case of this type may be filed only by the aggrieved, and that the case is dismissed if the aggrieved withdraws his complaint. These provisions are indications of the important position which morality and protection of the family occupied in Islamic Law. As a counterweight to the severe punishment imposed on the adulterer or fornicator, the law stipulates definite requirements for the proof necessary to establish the crime. The jurists are not satisfied with the mere requirement of four liable witnesses, but further stipulate that the witnesses must testify that they have witnessed the physical act of sexual intercourse.

The Hedaya defines Qazf as follows:--

Qazf in its primitive sense simply means accusation. By Qazf, in the language the law, is understood a man insinuating a charge of whoredom against a married man or woman; the person so acting being termed as Qazf or slanderer, and the man or woman so scandalised the Mukzoof, or slandered.

The Ordinance adopts *mutatis mutandis* the definition of defamation as given in Section 499 of the Penal Code, 1860. Section 3 of the Ordinance states that if any person makes or publishes any imputation of Zina against any person whether by words spoken or intended to be read, or by signs, or by visible representative with the intention of harming or knowing or having reason to believe that such imputation would harm the reputation or hurt the feelings of such person the person making such imputation shall commit the offence of Qazf. There are, however, some exceptions to this rule. The first exception is that imputation of Zina truthfully made in public interest or for public good would not amount to Qazf. The second exception is this that it would not amount to Qazf to prefer an accusation of Zina in good faith to the person being lawful authority over the person accused with respect to the subject-matter

of accusation except when the accusation is made before a Court and is not supported by evidence of four witnesses or when the Court finds any one witness to have given false evidence or the complainant is found to have given false accusation of 'Zina-bil-Jabr.'

EXPLANATION 1 : States that imputation of zina to a deceased person would amount to Qazf if the imputation would harm the reputation or hurt the feelings of that person if living and is harmful to the feelings of his family or other near relatives.

EXPLANATION 2 : States that alternative or ironical expansions of imputation may amount to Qazf. Imputation may be conveyed directly or indirectly, as by hints, or by signs, or by pictorial representation, or by other modes and symbols, or by way of questions, irony, exclamation, conjecture, of insinuation.

Q. 2. Define "Qazf liable to Hadd" What punishment is provided for this offence?

Ans. QAZF LIABLE TO HADD : "Qazf liable to Hadd" has been defined in Section 5 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 as under :

Whoever, being an adult, intentionally and without ambiguity commits Qazf of "zina" liable to 'Hadd' against a particular person who is a "muhsan" and capable of performing sexual intercourse is, subject to the provisions of this Ordinance, said to commit 'Qazf' liable to "Hadd".

EXPLANATION 1 : In this section "muhsan" means a sane and adult Muslim who either has had no sexual intercourse or has had such inter course only with his or her lawfully wedded spouse.

EXPLANATION 2 : If a person makes in respect of another person the imputation that such other person is an illegitimate child or refuses to recognise such person to be a legitimate child he shall be deemed to have committed Qazf liable to Hadd in respect of the matter of the person.

Qazf liable to Hadd is, thus, constituted when any person, who is an adult, intentionally and unequivocally makes an imputation of zina liable to Hadd against any person who is "muhsan" and capable of performing sexual intercourse.

Muhsan for the purposes of Section 5, Offence of Qazf (Enforcement of Hadd). Ordinance, 1979, means a save and adult Muslim who has never had any sexual intercourse has had such intercourse only with his wife.

Imputation of illegitimacy, or refusal to recognize any person as legitimate amounts to imputation of Qazf liable to Hadd in respect of the mother of the person not recognised as legitimate.

Punishment of Qazf liable to Hadd : Section 7 of Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 has prescribed punishment for offence of Qazf as follows:--

(1) Whoever commits 'Qazf' liable to 'Hadd' shall be punished with whipping numbering eighty stripes.

(2) After a person has been convicted for the Offence of Qazf liable to 'hadd' his evidence shall be admissible in any Court of law.

(3) A punishment awarded under sub-section (1) shall not be executed until it has been confirmed by the Court to which an appeal from the Court awarding the punishment lies; and until the punishment is confirmed and executed, the convict shall, subject to the provisions of the Code of Criminal Procedure, 1898, relating to the grant of bail or suspension of sentence, be dealt within the same manner as if sentence to simple imprisonment.

Section 7 of the Ordinance may thus, be summarised in the following manner:-

The person guilty of Qazf liable to Hadd shall be punished with whipping numbering 80 stripes and he would be disqualified from appearing as a witness in any Court. The punishment under this section shall be subject to the confirmation of the Court to which an appeal lies against the order of conviction and so long as such confirmation has not been accorded he shall be kept in simple imprisonment and he can be released on bail by the Appellate Court.

A prosecution witness stated to have seen both the accused (man and woman) committing zina in open in a garden. Both the accused were proved to have been married to one another. Accusation of witness was obviously false and absurd and witness should have been ordered to be prosecuted under Ordinance VIII of 1979. Police was directed to register a case against witness under Ordinance VIII of 1979. **PLD 1981 (FSC) 306.**

Good faith does not merely imply absence of ill will but presupposes reasonable degree of care and caution in making an imputation; due care and attention further imply genuine effort on the part of the accused to arrive at the truth. Appellant made allegation of zina against complainant (his wife). No evidence on record was available to show that he exercised the care and caution before levelling the allegation against his wife. **PSC 1984 Sh.C. 1.**

Accused proceeded against under the offence of Qazf for alleging a woman indulging in zina. Contention that he could not be

tried for offence, because under law proceedings could be taken against him only on application of woman against whom alleged false allegation had been levelled. While he had been proceeded on application of her husband was repelled observing that the trial Court while disposing of the application for quashment had specifically mentioned that charge of qazf was added on application of the woman. 1990 PCr.L.J. 1538.

Allegations of adultery by husband : The husband divorcing his wife on allegations of her unchaste character, adultery and disowning children from her-wife instituting complaint for Qazf against husband. Issuance of person by the Sessions Judge for appearance of the husband, impugned. Question arising in the Appellate Court whether provisions of Section 7 or 14 of the Ordinance VIII of 1979, would be applicable. Case remanded to another Sessions Judge for fresh trial after allowing parties to produce evidence with regard to facts, prior to pronouncement of divorce in order to decide about the controversy as regards the legitimacy otherwise of children. Revision in petition challenging order of remand failed. Plea raised in leave to appeal before Supreme Court was that accusations contained in divorce deed did not made out the case of Qazf for the petitioner and respondent were husband and wife at the relevant time nor procedure for lian was called for as the divorce was not complete and accusations were contained in divorce deed and pertained to the period when spouses were man and wife. Since parties had agreed to the remand of case for disposal of outstanding question and that was taking place in pursuance thereof, there was no justification for any objection to the proceedings. Petition for leave to appeal was not maintainable in circumstances. 1989 SCMR 428.

Q. 3. Who can file a complaint for "Qazf"?

Ans. Cognizance of this offence can be taken only on a report made to the public or on complaint lodged in Court either by the person in respect of whom qazf has been committed, or if he be alive, by any person authorised by him or if he be dead by any of his' ascendants or descendants.

Where both the accused man and woman were proved to be innocent and the prosecution witness was found to have told a lie that zina was committed by the man against the woman it was held that the Trial Court should have order for prosecution of the witness under the Qazf Ordinance. In the circumstances the Federal Shariat

Court directed the police concerned to call up the woman concerned and register a case against the witness for the offence of Qazf.

Q. 4. Define Laan. State the procedure of "Laan" when the wife does not accept the accusation?

Ans. LAAN : Under the Muslim Law, a charge of adultery preferred by a husband against his wife can only be established by the direct testimony of four witnesses to the fact. From the nature of the offence, however, the cases in which ocular and direct evidence is available are extremely rare. In order to obviate the evils which would necessarily result from a denial of all redress to the injured husband, in those instances where he is morally convicted of the guilt of his wife, but has no direct testimony to establish it, or when he alone is cognisant of the fact, the law has prescribed the proceeding by *l'aan*.

It must be added, however, that in prescribing the proceeding by *l'aan* the law has in view not only the interests of the husband but also that of the wife.

The husband shall have to say on oath before the Court : "I swear by Allah the Almighty and say I am surely truthful in my accusation of zina against my wife (wife to be named)" and after he has said so four times he shall say: "Allah's curse be upon me if I am liar in my accusation of zina against my wife (wife to be named) and the wife shall in the same words refute the allegation. The Court in such a case will dissolve the marriage and this order would be non-appealable. Where, however, either the husband or the wife refuses to go through such procedure the husband or the wife, as the case may be, shall be imprisoned until in the case of husband he has agreed to go through such procedure or in the case of wife she has agreed to go through such procedure or accepted the accusation to be true. If the wife accepts the accusation to be true she shall be given the same punishment as is awarded for the offence of zina liable to Hadd, i.e., being stoned to death at a public place if she is a muhsan or being inflicted one hundred stripes at a public place if not a Muhsan.

PROHIBITION

(Enforcement of Hadd)

Order (4 of 1979)

Q. 1. Define intoxicant and intoxicating liquor?

Ans. INTOXICANT : "Intoxicant" means articles specified in the schedule, which are originally solid matters but includes intoxicating liquor and such other substances as may be declared to be intoxicants by the Provincial Governments.

INTOXICATING LIQUOR : Intoxicating liquor means substances other than specified above, even if liquefied, and includes toddy, spirits of wine, wine, beer, and all liquids consisting of or containing alcohol which are normally used for purposes of intoxication.

Q. 2. What sorts of people are punishable under the Ordinance?

Ans. Whoever : --

- (a) imports, exports, transports, manufactures or processes are intoxicant ; or
- (b) bottles any intoxicant ; or
- (c) sells or serves any intoxicant ; or
- (d) allows any of the acts aforesaid upon premises owned by him or his immediate possession ;

shall be punishable with imprisonment of either description for a term which may extend to five years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

Article 4 prohibits owning, possessing, or keeping any intoxicant in custody and makes it, contravention punishable with imprisonment of either description extending to 2 years, or with whipping extending up to 30 stripes and with fine which may extend to any amount. This Article prescribes a smaller punishment as compared to that prescribed under Article 3 because this appears to relate to individual cases while offences under Article 3 relate to commission of offence by several persons by way of trade and generally on a large scale.

Non-Muslim foreigners and non-Muslim citizens of Pakistan can, however, keep a reasonable quantity of intoxicating liquor for use in religious ceremonies at the time of such ceremonies.

Q. 3. What kinds of people are exempted from the prohibitions contained in the Ordinance ?

Ans. The prohibitions contained in the previous articles i.e., articles 3 and 4 shall not apply to any act done under and according to the provisions of this Order, or the terms of any rule, notification, order, or licence issued under this Order. Thus the Government may permit manufacture, import, transport, export, sale or possession of any intoxicant for *bona fide* medicinal, scientific or industrial purpose or for consumption by a non-Muslim citizen of Pakistan as part of a religious ceremony or by a non-Muslim foreigner for his private consumption (but not in a public place).

Q. 4. Define Drinking. In which cases of Drinking Hadd shall not be enforced?

Ans. DRINKING : Whoever, intentionally and without '*ikrah*' or '*irtizar*' takes an intoxicant by any means whatsoever, whether such taking causes intoxication or not, shall be guilty of drinking.

EXPLANATION :- In this Article :-

- (a) *ikrah* means putting any person in fear of injury to the person, property or honour of that or any other person, and
- (b) '*irtizar*' means a situation in which a person is in apprehension of death due to extreme hunger or thirst or serious illness.

This article defines drinking "Drinking" means intentionally (without *ikrah* or *irtizar*) taking any intoxicant by any means whatsoever even though intoxication may not be caused.

Irtizar means putting in fear of injury to person, property, or honour of the person concerned or any other person such as for example one's wife or children.

Irtizar means putting a person in such situation where he feels an apprehension of death due to extreme hunger, thirst or illness.

According to the case of *Nosher Rustam Sidhwa v. Federation of Pakistan*, a petition was filed by a follower of Zoroastrian religion to challenge the provisions, placing an embargo or about possession and consumption of liquor (Sec. 34) and the provisions about issuance of licences for import, manufacture etc. to person in respect of any institution whether under the Management of the Government or not. (Sec. 17) Other sections to which the challenge is thrown are Sections 6, 11-B, 12 and 14.

The main argument of the learned Counsel for the petitioner as regard the ban on consumption of liquor by non-Muslims was based upon verse 90 of Chapter V (5:90) He urged that it was addressed to Muslims only. In addition he referred to the treaties of Medina and Najran during the lifetime of the Holy Prophet (Peace be upon him) which made no reference to liquor or its use or possession although in the later treaty restrictions were placed on, Riba. It should be taken to mean the learned Council argued that the use of liquor was permitted to the non-Muslim covenanting parties to use liquor without any restriction from the State.

As regard manufacture and sale of liquor, the learned counsel argued that they were completely prohibited to Muslims. Section 17 was therefore, repugnant to these prohibitory commands since it allows the Government or non-Governmental institutions to apply for licences for manufacture, import, etc., of liquor not only for medicinal industrial or scientific use but also for non-Muslim foreigners, and non-Muslim citizens of the country who require it for use as a part of their religious ceremony. The learned Counsel submitted that at least the Muslims or institutions having majority of Muslims should not be allowed to manufacture and import liquor for the use of non-Muslim foreigner and for its exceptional use by non-Muslims of this country. One of the arguments of the learned counsel was that where a particular religion like the Zoroastrian religion does not prohibit the use of the liquor but allows its use in moderation, any restriction imposed by the State would amount to interference with the Zoroastrian's religious creed.

The statement of a person to the effect that he was drinking liquor on medical advice. Constitutional petition with prayer to call upon said person to show his authority to hold office and continue as members of the Provincial Assembly and Chief Minister of Province or such other order or direction restraining him from holding. The petitioner, for the purposes of obtaining relief had relied on complaint filed before the Court at Lahore but he was unable to state whether such complaint was still pending or proceedings were continuing there or not. Person had taken plea that he was drinking liquor under medical advice. Such questions had to be investigated as questions of fact being involved. Constitutional petition was not maintainable and was dismissed in circumstances.

Cases in which Hadd shall not be enforced : (1) 'Hadd' shall not be enforced in the following cases, namely:-

- (a) When drinking is proved only by the confession of the convict but he retracts his confession before the execution of 'Hadd', and
- (b) When drinking is proved by testimony but before the execution of 'Hadd' any witness resiles from his testimony so as to reduce the number of witnesses less than two.

(2) In a case mentioned in (1) the Court may order retrial in accordance with the Code of Criminal Procedure, 1898.

This section states that in the cases of drinking Hadd shall not be enforced when the only available evidence is confession of the accused and he retracts it before the execution of Hadd or when the available proof is testimony of witnesses and any witness relises from testimony so as to reduce the number or witnesses to less than two.

In the first case, *i.e.*, when the accused retracts his confession, the Court may order retrial in the manner laid down in the Criminal Procedure Code, 1898.

Appeal against conviction/sentences : The appeal against the conviction/sentences was recorded by the trial Court. The appellant contending that charge against him had not been proved at all by evidence on record. High Court finding much force in contention's acquittal.

Q. 5. What punishment are provide for drinking liable to tazir?

Ans. Kinds of drinking : There are two kinds of drinking.

Drinking may be either drinking liable to 'Hadd' or drinking liable to Ta'zir.

Drinking liable to Tazir : Whoever.

- (a) being a Muslim, is guilty of drinking which is not liable to 'Hadd' under Article 8 or for which proof in either of the forms mentioned in Article 9 is not available and the Court is satisfied that the offence stands proved by the evidence on the record ;
- (b) being a non-Muslim citizen of Pakistan is guilty of drinking except as a part of ceremony prescribed by his religion ; or
- (c) being a non-Muslim who is not a citizen of Pakistan is guilty of drinking at public place ;

shall be liable to Tazir and shall be punished with imprisonment of either description for a term which may extend to three years or with whipping not exceeding thirty stripes, or with both.

Section 11 relates to punishment by *Tazir* in cases of drinking. When a Muslim is guilty of drinking but he is not liable to Hadd and for which no proof is available in either forms given in Article 9 but the Court is satisfied that the offence stands proved by the evidence on record or when a non-Muslim citizen of Pakistan is found guilty of drinking otherwise than as part of a religion or when a Non-Muslim foreigner is found drinking at a public place the accused in all such cases shall be liable to *tazir* and liable to be punished with imprisonment of either description which may extend to 3 years, or with whipping not exceeding 30 stripes or with both.

Neither in F.I.R. nor in the prosecution evidence it was stated that the accused was found drinking intoxicant at a public place. Stomach contents of the accused were not examined, and Chemical Examiner's report in respect of the accused was also not obtained. The accused was acquitted in circumstances.

Q. 6. When can a licence issued under this order be cancelled?

Ans. (1) The Collector may cancel or suspend a licence :

(a) if any fee payable by the holder thereof be not duly paid,

or

(b) in the event of any breach by the holder thereof or by his servant or by any one acting with his express or implied permission on his behalf of any of the terms or conditions of the licence.

(2) The Collector shall cancel a licence if--

(a) the holder thereof is convicted of any offence under this Order; or

(b) the purpose for which licence is granted ceases to exist.

(3) As and when any licence is cancelled under clause (1) or clause (2), the holder thereof shall at once declare to the Collector the stock of intoxicating liquor or articles containing such liquor lying with him, and dispose of such stock to such authorised person as the Collector may specify.

Q. 7. When can a search warrant be issued under this Order ?

Ans. If any Collector, Prohibition Officer or Magistrate, upon information obtained and after such inquiry as he thinks necessary, has reason to believe that an offence under Article 3, Article 4, Article 8 or Article 11 has been committed, he may issue a warrant for the search for any intoxicant, material, still, utensil, implement or apparatus in respect of which the alleged offence has been committed.

PRINCIPLES OF CRIMINAL LAW

Q. 1. Define Crime?

Ans. CRIME : A crime may be said to be an act which any given society considers to be sufficiently injurious to justify visiting punishment on the wrong doer and prescribing a special procedure for dealing with it.

The expression 'Crime' does not have the same meaning in popular and legal use. However, commonly, the crime is the violation of every moral rule established by religious usage or code of morality recognized by people.

A 'Criminal' is a person who has done something in violation of some religious or moral code and punishable by society or divine authority. But these conceptions vary from time to time and in different societies. However, there are certain crimes which are condemned by people of all races and colour, for example, the crime of reason, murder and robbery *etc.*

The English Criminal Law, which serves as a basis of Pakistan Criminal Law, is the result of a steady growth through the centuries which not merely the legislature, from time to time, but also the judges, continuously have worked to adapt the need of changing society. These needs have found expression in the ideas current in each successive age as to what is just and expedient in Government.

To define crime is a task which so far has not been satisfactorily accomplished by any writer. In fact, criminal offences are basically the creation of the criminal policy adopted from time to time by those sections of the community who are powerful enough to safeguarded their own security and comfort by causing the sovereign power in the State to express conduct which they felt may endanger their position. But a 'Crime' may be described, as a result of human conduct (active or passive) which it is the policy of the governing power in the State to prevent. The crime results in punishment and that a special procedure is followed in deciding on the guilt of the accused person.

Q. 2. What is Crime? What are its essential elements? Discuss? .

Ans. CRIME AND ITS ESSENTIAL ELEMENT.

1. **CRIME :** A crime is an act of omission or commission, contrary to Municipal Law, tending to the prejudice of the community for which punishment can be inflicted as the result of judicial proceedings taken in the name of state.

The expression 'crime' does not have the same meaning in popular and legal use. However, commonly, the crime is violation of every moral rule established by religious usage or code of morality recognised by people.

SOME DEFINITIONS OF CRIME : Different legal experts has defined the term 'crime' in different style. Some definitions are being given below:

(1) **BLACKSTONE DEFINES CRIME AS :** "An act committed or omitted in violation of public law forbidding or commanding it".

(2) **HALSBURY DEFINES IT IN THE FOLLOWING WORDS :** "A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment."

(3) **IN THE WORDS OF JAMES STEPHEN :** "Crime is such an act which is prohibited or forbidden both by law and moral values of society."

(4) **TERM 'CRIME' IS DEFINED IN :** "Criminal Procedure Code, 1898" under the heading 'offence' in the following words:

"Offence means any act or omission made punishable by law for the time being in force; it also includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act" (Section 4(o), Cr.P.C.)

CHARACTERISTICS OF CRIME : J.W. Cecil turner, the editor of kenney's latest edition gives the following characteristics of crime--

- (a) it is a harm, brought about by human conduct, which the sovereign power in the state desires to prevent;
- (b) that among the measure of prevention selected is the threat of punishment;
- (c) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm and is according to law, to be held legally punishable for doing so.

2. Essential elements of crime. Essential elements of Crime are as under:

- (i) Human being;
- (ii) *Mens rea* (guilty mind);
- (iii) *Actus reus* (Act or omission);
- (iv) Injury.

(i) **Human being** : The first essential element of crime requires that the act must be committed by a human being. In ancient times, punishments were inflicted on animals also for injury done by them. However no such practice was followed in Pakistan and with the development of the notion of *mens rea* such trials and punishments were completely abandoned. So the first essential of crime is a human being, who

- (a) must be under legal obligation to act in a particular manner; and
- (b) should be fit subject for award of appropriate punishment.

(ii) **Mens rea (guilty mind)** : The second important essential of a crime is *mens rea* (guilty mind). There can be no crime of any nature without an evil mind. Every crime requires a mental element. Even in strict or absolute liability some mental element is required. That is why *mens rea* or *actus non facit reum nisi mens sit rea* is considered a fundamental principle of penal liability. The meaning of the above said term is that intent and act must both concur to constitute the crime. It has, however, been a matter of great difficulty to arrive at the true meaning of the *mens rea*.

According to Kenney the term "*mens rea*" has been used by the Courts in two different senses:-

- (a) to denote the accused person's attitude of mind to what he was doing from which can be decided the question whether his conduct was or was not voluntary; and
- (b) to denote the accused person's foresight of the consequences of what he was doing.

Notion of *mens rea* in early primitive societies was non-existent and liability was absolute and offender was responsible whether he acted innocently or negligently.

The word *mens rea* has nowhere been used in P.P.C. but it has been applied in two different ways:

- (i) While defining offences words used indicate actual criminal intent required for the offence. The expressions fraudulently, dishonestly voluntarily and intentionally, etc., used in the definition indicate the criminal intent. No such words have, however, been used in case of offences which cannot be committed by innocent persons. (Sections 121, 124-A and 232 of P.P.C. may be referred for such offences;
- (ii) The P.P.C. contains a separate chapter on general exceptions (Ss. 76-106) which indicates the circumstances where absence of criminal intent may be presumed. This negative method of applying *mens rea* in the P.P.C. has been found to be very useful.

The doctrine of *mens rea* has been applied by Courts in Pakistan and it is now firmly settled law that *mens rea* is an essential ingredient of crime.

(iii) **Acts Reus (Acts or omission)** : The third essential element of crime is *actus reus*. In other words some overt act or illegal omission must take place in pursuance of the guilty intention. Prof. Jerome Hall said that something in addition to a *mens rea* is required to produce a criminal harm. There must also be a manifestation of *mens rea* in the external words. Prof. Kenny has defined the term thus, "such result of human conduct as the law seek to prevent." He was the first writer to use the term *actus reus* and Russel called it physical event.

The *actus reus* is constituted by the event and not by the activity which caused the event. A deed may consist of harm and destruction of property and even of life, but it is not a crime unless the circumstances are such that it is illegally prohibited. Accordingly no crime is committed by a duly appointed executioner who hangs to death a criminal because in spite of his full intention to kill, his act was commanded by the law. It would, however, be unlawful (*Actus Reus*) if the accused is put to death by an unauthorised person or even by the lawfully appointed executioner if the method of taking the life of accused was unlawful.

So *mens rea* alone is not enough to constitute a crime but element of *actus reus* must also be present in it.

(iv) **Injury** : The fourth essential requirement in crime is injury to another person or to society at large. The injury should be illegally caused to any person in body, mind, reputation or property as according to Section 44 the word injury denotes any harm whatever illegally caused to any person in body, mind reputation or property. The word injury is of wide connotation and includes all injuries caused by tortious act. Three sections in the Code specifically deals with the threat of injuries. i.e. Ss. 189, 190 and 385.

So the above are the four essential elements that go to constitute a crime.

Q. 3. What are the Functions of Criminal Law?

Ans. FUNCTIONS OF CRIMINAL LAW : Generally speaking, the law in general is a preservative instinct of the individual and of the race. The observance in the religious customs and the rules in the society are assured through the medium of law. The law sets down the rules of morality and helps in the development of civilization. However, the function of Criminal Law is as follows:

- (1) Preservation of life.
- (2) Protection of individual property.
- (3) Protection of State and country.
- (4) Exigencies of good Government.
- (5) Maintenance of public tranquility and peace.
- (6) Upkeep of morality and culture.

Q. 4. What is the difference between Crime and Tort. Discuss in detail?

Ans. DIFFERENCE BETWEEN-CRIME AND TORT :

There is no fundamental difference between a crime and a tort. Any conduct which harms an individual to some extent harms society, since society is made up of individuals and therefore although it is true to say of crime that is an offence against society, since society is made up of individuals.

It is important to make a distinction between crime and tort. In the early English Law, there was no clear distinction between criminal and civil offences. So there does not seem to be an inherent difference between a crime and a tort. The difference between the two is one of degree only. The difference can be shown as follows:

- (1) Crime is a wrong for which the proceedings can be brought in the Criminal Courts, while in case of tort, the proceedings can be brought in Civil Courts.
- (2) Crime is an offence against the society and the Government follows the case on behalf of society, while in tort, it is the private person who brings proceedings.
- (3) In crime, punishment is awarded by Courts in terms of imprisonment and fine but in case of tort, only damages are awarded as punishment.

In crime, State is responsible to bring to book a person who has committed crime, while it is upto the individual to bring action in the Civil Court in case of tort.

- (4) In crime, the law as given in Criminal Procedure Code (of Pakistan) is applicable while in tort, the law as given in Civil Procedure (of Pakistan) is applicable.
- (5) In crime the State prosecutes regardless of the wishes of the person who has been wronged. In tort it is not so. State has to play a significant role in cases of crime while in tort, State only provides a machinery of justice.

- (6) The rules of evidence in crime are different from those in civil cases. Crimes involve *mens rea* but in civil cases, emphasis is on compensation. In criminal cases prosecution has to prove the guilt of the accused beyond reasonable doubt while in tort, the evidence is weighed on balance of probabilities.
- (7) In case of tort, an individual can compromise in litigation with his opponent but in crime, it is only possible in cases of compoundable offences.

However, some illegal acts are crimes as well as torts and proceedings can simultaneously start in criminal and civil cases. The result of the decision in any of the two Courts does not affect the proceedings or decision of the other. The example of such illegal acts are, cases of assault defamation, liable, slander, theft, injury to property, injury to human body and in Pakistan, even cases of homicide.¹

Q. 5. Define Criminal Justice. What are different theories of punishment?

CRIMINAL JUSTICE

Ans. (i) Criminal justice is penal or retributive, as it punishes the wrongdoer and is provided through criminal law of the country.

DEFINITION OF CRIMINAL JUSTICE : "Criminal Justice" means a justice through which a wrong-doer is punished by state to provide relief to the victim or his family.

PURPOSE OF CRIMINAL JUSTICE : The purpose of Criminal Justice is to punish the wrong-doer. He is punished by the State. The question arises, what is the end of Criminal Justice. From very ancient times, a number of theories have been given concerning the purpose of punishment. Those theories may be broadly divided into two classes.

- (a) The view of one class of theories is that end of Criminal justice is to protect and to add to the welfare of the state and the society.
- (b) The view of the other class of theories is that the purpose of punishment is retribution. The offender must be made to suffer for the wrong committed by him.

Source: Jurisprudence by
V.D. MAHJAN.

1. See Qisas and Diyat Ordinance, 1991 Criminal Law (Amendment) Ordinance, I of 1991.

(ii) **Theories of punishment** : There are five theories of punishment:

- (1) Theory of deterrent punishment.
- (2) Theory of preventive punishment.
- (3) Theory of reformatory punishment.
- (4) Theory of retributive punishment, and
- (5) Theory of compensation.

(1) **DETERRENT THEORY** : Sir John Salmond writes about deterrent punishment.

"The primary object of criminal justice in awarding punishment is to deter people from committing crime. Person like-minded with the persons punished naturally feel deterred and thus criminal propensities of man are placed under a check."

Paton writes : "The deterrent theory emphasises the necessity of protecting society, by so treating the prisoners that others will be deterred from breaking laws."

Objections : Critics have raised some objections on deterrent punishment. Salmond has mentioned two objections on this theory of punishment.

(1) "First is that deterrent punishment often defeats its own object. It is argued that since the fear of the unknown is much more effective and as long as a criminal has not been punished, the punishment that may follow may hold some terror for him but when once he is punished, punishment loses its terror."

Salmond says by commenting on this objection. "The objection may indeed hold true in some cases but certainly it does not hold good in all cases. Further, punishment is meant to deter not merely the offender but also other like-minded persons and to such persons the deterrent force of punishment shall remain unaffected".

(2) "The knowledge that breach of certain rule of justice will entail a certain punishment, and no more sometimes acts quite contrarily to what it was intended to do. As intending criminal may say, 'at the most, law can imprison me for so many years, nothing worse can happen' and thus commit the crime'.

This objection can be met on the same ground as the previous one.

(2) **PREVENTIVE THEORY** : This has also been called "Theory of disablement" as it aims at preventing the crime by disabling the criminal. In order to prevent the repetition of the crime, the offenders are punished with death, imprisonment for life.

For example a murder is committed by 'A' and he is punished. Here 'A' is punished not for having committed the murder, but in order that no further murder be committed.

Objection : Salmond writes by mentioning the objection on preventive punishment.

"The aspect has also been objected to on the ground that it has the undesirable effect of hardening first offenders by throwing them into constant association with habitual offenders."

Salmond writes by answering the said objection.

"This objection can also be met on the same ground as the previous ones. The juvenile offenders, however, in view of this objection, may be kept in reformatory schools and separated from hardened criminals."

(3) REFORMATIVE THEORY : Salmond writes about reformatory punishment.

"The reformatory theory of punishment is based on identifying crime with disease and consequently it consists of application of such curative and medical forms of punishment as will cure the criminal of his diseased mind. According to this theory, hanging is not a fitting penalty for murder, for in this way we lose the criminal instead of curing him. Flogging and corporeal punishments are similarly characterised as relics of barbarism. This theory advocates imprisonment in order that the criminal may be transformed into a good citizen by physical, intellectual and moral training. Its advocates think that prisons must be turned into dwelling houses where the criminals may have such opportunities to improve as they never had before."

Objection : Some jurists said by objectioning on reformatory theory of punishment that by this method offenders consider the jail (reformatory institution or school etc.) as place of joviality, and when such comfort will provide to them in this type of jails, they feel that it is the easiest place to live in, until we are here we will live with comfort. In this way, some offenders do not agree to improve themselves in this type of institutions and nor they feel any repent on their acts. So by this reason Salmond said that "it should not be forgotten that liberal application of this theory may prove an incentive to the commission of crime."

The view of Salmond is that:-

"A perfect system of criminal justice is based neither on the reformatory nor on the deterrent principle alone, but on the perfect combinations between the two and in this compromise the deterrent principle should possess the predominant influence."

(4) RETRIBUTIVE THEORY : This theory is based on the principle of any eye for eye and tooth for tooth. The offender should be punished according to the nature, of injury caused by him to the victim. In other words, punishment should be in proportion to the injury caused by the accused.

This theory does not look to the motive but to the intention in committing crime.

Saying of John Salmond is that "Retributive punishments serves to satisfy the sense of retribution which is naturally stirred up when a person is wronged."

It is said in Jewish law in relation to retributive punishment.

"Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth."

Theory of expiation: Retributive aspect of punishment is based on the theory of expiation. The idea tooth for tooth and eye for eye, in course of time, took the shape of expiation. The theory underlying expiation is that the crime is done away with, cancelled or blotted out by the suffering of its appointed penalty or in other words, commission of crime is a debt due to the law, and this debt is paid up when punishment is suffered.

The maxim goes:

"Guilt plus punishment is equal to innocence."

(5) COMPENSATION THEORY : According to this theory, the object of punishment must be not merely to prevent further crimes but also to compensate the victim of the crime. The contention is that the mainspring of criminality is Agreed and if the offender is made to return the ill-gotten benefits of the crime, the spring of criminality would dry up.

Objection : Critics of this theory point out that it tends to over simplify the motives of the crime. The motive of a crime is not always economic. Offences against the State, against justice against religion, against marriage and even against persons, may not always be actuated by economic motives. There may be other motives involved in the case. In those cases, the theory of compensation may be neither workable nor effective. Even in the case of offences actuated by such motives, the economic position of the poor may be such that compensation may not be available. If the offender is a rich person, the payment of any amount may be no punishment for him.

Q. 6. Write a short note on Theories of Criminality in Islam?

Ans. THEORIES OF CRIMINALITY IN ISLAM : The main theory of criminality in Islam is that a man himself responsible for his actions. It is due to his heinous and evil deeds that he is criminally prosecuted. According to Islamic view, no one is born criminal. These are his own acts which make him good or bad. He is free to act.

The crimes are due to one's own volition to act in a manner that violates the commandments of Allah. In short, the cause of crime is one's own evil acts. Another important approach to the theory of crime is that no one will be responsible for the actions of others.

CLARIFICATION OF CRIME : Crime may be classified as:

1ST GRADE : Crime affecting the public. It includes all those crimes which affect the general public. It has two kinds and each has different laws--

(A) FIRST KIND : Crimes with full punishment are seven in number: (1) Zina, (2) slander, (3) drinking, (4) theft, (5) robbery (6) apostasy, and (7) treason.

(B) SECOND KIND : (1) Intentional homicide, (2) culpable homicide not amounting to murder, (3) unintentional murder, (4) intentional injury and (5) unintentional injury.

2ND GRADE : This grade includes all those crimes which are not classified under the first grade. It has three kinds :

- (1) The crimes relating to original punishments are those which are neither Hudood nor retaliation nor blood-money.
- (2) The crimes relating to those Hudood whose punishment is not prescribed; either they are incomplete or their Hadd is averted.
- (3) Crimes relating to retaliation or blood-money whose punishment is not prescribed, such as those, crimes in which there is no retaliation or blood-money.

Q. 7. Write a note on punishment in Islam?

Ans. PUNISHMENT IN ISLAM : Shari'a divides crime into three categories ; Hudood Qisas and Ta'zir.

(1) HUDOOD : Hudood offences are acts prohibited by God and punished by defined mandatory penalties because the acts violate a right protected by the Qur'an. Jurists differ on the number of Hudood offences. Some list seven such crimes ; theft, highway robbery, adultery, defamation (false accusation of adultery), wine

drinking, apostasy, and rebellion. Some jurists omit rebellion, while others restrict the list to the first four crimes only, classifying wine drinking and apostasy as crimes of Ta'zir, since neither the Qur'an nor the Sunnah prescribed specific penalties for them. A penalty imposed by virtue of being a divine right means that the prescribed specific penalties for them. A penalty imposed by virtue of being a divine right means that the prescription is necessary for the protection of a fundamental public interest.

(2) **QISAS** : Qisas crimes which include murder, maiming and battery, are crimes against the person. Sunnah, and the decision to inflict it rests with the closest of kin as avenger of blood. It is his right to choose between inflicting the prescribed penalty, taking compensation (Diyat), or pardoning the offender. The ruler cannot pardon crimes incurring Qisas penalties, but if the nearest-of-kin grants a pardon, the ruler may in his discretion impose a Ta'zir punishment on the criminal.

(3) **TA'ZIR** : Crimes include all crimes for which there are no specified penalties in the Qur'an or Sunnah, Whether an act is punishable under Ta'zir is left to the ruler or judge to determine in accordance with the public interest and changing conditions and times.

Furthermore, Islamic jurists agree that punishment cannot be imposed unless three requirements are satisfied. It must :

- (1) be consistent with the principle of legality ;
- (2) be individualised ; and
- (3) apply equally to all persons.

Q. 8. How many elements are constituting a Crime ?

Ans. CRIME : There are four elements that go to constitute a crime, viz., (1) A human being; (2) Guilty intention or *mens rea* on the part of such human being; (3) *Actus reus* illegal act or omission, and (4) injury to another human being. These elements are briefly stated as under :--

(1) **HUMAN BEING** : The first element requires that the act must be committed by a human being. The first essential of a crime is a human being who--

- (i) must be under legal obligation to act in a particular manner; and
- (ii) should be a fit subject for award of appropriate punishment.

(2) **MENS REA** : The second important essential of a crime is *mens rea* or evil intent. There can be no crime of any nature without an evil mind. Every crime requires a mental element. Even in strict or absolute liability some mental element is required. That is why *mens rea* or *actus non facit reum nisi mens sit rea* is

considered a fundamental principle of penal liability. The meaning of the term "*actus non facit reum nisi mens sit rea*" is that intent and act must both cover to constitute the crime, it has, however, been a matter of great difficulty to arrive at the true meaning of *mens rea*. The existence or non-existence of specific *mens rea* is a crucial factor in case of attempt to commit Qatl-e-Amd. Lord Diplock said: "An act does not make a man guilty of a crime unless his mind be also guilty. It is thus not the *actus* which is *reus* but the man and his mind respectively it is well to record this as it has frequently led to confusion". The influence of the expression becomes, quite evident if we trace the history of criminal law. The conception or *mens rea* has been different from time to time according to the changing underlying conception and objects of criminal justice.

Notion of *mens rea* in early primitive societies was non-existent and liability was absolute and offender was responsible whether he acted innocently or negligently. The words *mens rea* has nowhere been used in the PPC but it has been applied in two different ways :-

(1) While defining offences words used indicate actual criminal intent required for the offence. The expressions fraudulently, dishonestly, voluntarily and intentionally, etc., used in the definitions indicate the criminal intent. No such words have, however, been used in case of offences which cannot be committed by innocent persons. Such offences are waging against Government (S. 121), Sedition (S. 124-A) and Counterfeiting of Coins (S. 232, etc.)

(2) The PPC contains a separate Chapter on general exceptions (Ss. 76-106) which indicates the circumstances where absence of criminal intent may be presumed. This negative method of applying *mens rea* in the PPC has been found to be very useful.

The doctrine of *mens rea* has been applied by Courts in Pakistan and it is now firmly settled law that *mens rea* is an essential ingredient of offence. This point has come under judicial scrutiny on many occasions.

Mens rea by necessary implications may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated.

The element of *mens rea* is not required beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden. In the case of modern statutory offences the maxim has not general exception and the statutes are to be regarded themselves prescribing the mental element which is pre-requisite to a conviction. So *mens rea* is an essential element of crime in every penal statute unless the same either expressly or by necessary implication is ruled out by the statute.

(3) ACTUS REUS (ACT OR OMISSION) : The *actus reus* (act or omission) is an essential element of crime. In other words some overt act or illegal omission must take place in pursuance of the guilty intention. It is said that something in addition to a *mens rea* is required to produce a criminal harm.

The *actus reus* is constituted by the event and not by the activity which caused the event.

(4) INJURY TO ANOTHER HUMAN BEING : The injury should be illegally caused to any person in body, mind, reputation, or property as according to Section 44 the word "injury" denotes any harm whatever illegally caused to any person in body, mind, reputation or property. The word 'injury' is of wide connotation and 'includes all injuries caused by tortious act. These sections in the Code specifically deal with threats of injury, i.e., Sections 189, 190 and 385.

So the above are the four elements (i.e., a human being, (ii) guilty intention or *mens rea* on the part of such human being, (iii) *actus reus* illegal act or omission, and (iv) injury to another human being that go to constitute a Crime.

It will not be out of place to say something here about *good faith* which plays vital role in the law of Crimes.

The term good faith has been thus defined in Section 52: "Nothing is said to be done or believed is good faith which is done or believed without due care and attention". The term has been used in many Sections but has not actually been defined. Section 52 gives only a negative definition of the term. Words "due care" and "attention" used in Section 52 are of importance and on proper analysis of definition it is derived that a thing shall be deemed to be done in good faith where in fact it is done with due care and attention.

Q. 9. Write a note in detail on the "Principles of Vicarious liability"?

Ans. VICARIOUS LIABILITY : Hitherto we have dealt exclusively with the conditions of liability, and it is needful now to consider its incidence. Normally and naturally the person who is liable for a wrong is he who does it. Yet both ancient and modern law admit instances of vicarious liability in which one man is made answerable for the acts of another. In more primitive systems, however, the impulse to extend vicariously the incidence of liability receives free scope in a manner altogether alien to modern notions of justice. It is in barbarians times considered a very natural thing to make every man answerable for those who are kin to him. In the Mosaic legislation it is deemed necessary to lay down the express rule that "Fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin". Plato in his laws does not deem it

needless to emphasis the same principle. Furthermore, so long as punishment is convicted rather as expiative, retributive, and vindictive, than as deterrent and reformatory, it might seem reasonable for the incidence of liability to be determined by consent, and for a guilty man to provide a substitute to bear his penalty and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment but there is no reason why the victim should be one person rather than another.

Morally, however, such proceedings would be indefensible. Most people would agree that punishment, since it consists of the infliction of pain, must be justified, for to inflict pain without justification is immoral and itself an evil. Now it is justifiable to punish an offender, provided that the punishment is not out of all proportion to the offence, because the evil inflicted is a means to a greater good, *i.e.*, the protection of society; because the wrongdoer has forfeited, of his own volition, the right not have evil inflicted on him, since he might have abstained from his wrongdoing and because the punishment may serve to turn him away from his wrong-doing. But where punishment is inflicted on some person other than the actual offender, the law is treating the victim as a mere means to an end. In such a case the victim's own conduct is not in question; nor is there any suggestion of reforming the victim himself he is being punished merely for the greater good of others. And this is to regard him as less than a person, it is to use him as a thing. In so far as the law is in harmony with morality it will avoid vicarious liability, though existing is exceptional.

Modern civil law recognises vicarious liability in two chief classes of cases. In the first place, masters are responsible for the acts of their servants done in the course of their employment. In the second place, representatives of dead men are liable for deeds done in the flesh by those whom they represent. We shall briefly consider each of those two forms.

It has been sometimes said that the responsibility of an owner for his servant has its historical source in the responsibility of an owner for his slave. This, however is certainly not the case. The English doctrine of employer's liability is of comparatively recent growth. It has its origin in the legal presumption, gradually become conclusive, that all acts done by his master's express or implied authority, and are therefore in truth the acts of master for which he may be justly held responsible. No employer will be allowed to say that he did not authorise the act complained of or even that it was done against his express injunctions, for he is liable nonetheless. This conclusive presumptions of authority has now after the manner of such presumptions. disappeared from the law, after having

permanently modified it by establishing the principle of employer's liability. Historically, as we have said this is a fictitious extension of the principle, *Qui facit per alium facit per se*. Formally, it has been reduced to the *laconic maxim, Respondeat superior*.

The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? Who could establish liability in such a case, were evidence of authority required, or evidence of the want of it admitted.

A further reason for the vicarious responsibility of employers is that employers usually are, while their servants usually are not, financially capable of the burden of civil liability. It is felt probably with justice, that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained. Such delegation confers upon impecunious persons means and opportunities of mischief which would otherwise be confined to those who are financially competent. It disturbs the correspondence which would otherwise exist between the capacity of doing harm and the capacity of paying for it. It is requisite for the efficacy of civil justice that this delegation of powers and functions should be permitted only on the condition that he who delegates them shall remain answerable for the acts of his servants, as he would be for his own.

A second form of vicarious responsibility is that of living representatives for the acts of dead man. There is no doubt that criminal responsibility must die with the wrongdoer himself, but with respect not penal redress the question is not free from difficulty. For in his form of liability there is a conflict between the requirements of the two competing principles of punishment and compensation. The former demands the termination of liability with the life of the wrongdoer, while the latter demands its survival. In this dispute the older common law approved the first of those alternatives. The received maxim was: *Acto personalis moritur cum persona*. A man cannot be punished in his grave; therefore it was held that all actions for penal redress, being in their true nature instruments of punishment, must be brought against the living offenders and must die with him. Modern opinion rejects this conclusion and by various statutory provisions the old rule has been almost entirely abrogated. It is considered that although liability to afford redress ought to depend in point of origin upon the requirements, of punishment, it should depend in point of

continuance upon those of compensation. For when this form of liability has once come into existence, it is a valuable right of the person wronged, and it is expedient that such rights should be held upon a secure tenure, and should not be subject to extinction by a mere irrelevant accident such as the death of the offender. There is no sufficient reason for drawing any distinction in point of survival between the right of a creditor to recover his debt and the right of a man who has been injured by assault or defamation to recover compensation for the loss so suffered by him.

As a further argument in the same sense, it is to be observed that it is not strictly true that a man cannot be punished after his death. Punishment is effective not at the time it is inflicted, but at the time it is threatened. A threat of evil to be inflicted upon a man's descendants at the expense of his estate will undoubtedly exercise a certain deterrent influence upon him and the apparent injustice of so punishing his descendants for the offences of their predecessor is in most cases no more than apparent. The right of succession is merely the right to acquire the dead man's estate, subject to all charges which, on any grounds, and apart altogether from the interests of the successors themselves, may justly be imposed upon it.

Q. 10. Certain persons are treated in law, to a greater or lesser extent, as being incapable of criminal responsibility? Discuss.

Ans. Those persons who are treated in law, to a greater or lesser extent, as being incapable of criminal responsibility. These are:-

- (i) Persons of unsound mind ;
- (ii) Drunken persons ;
- (iii) Minors ; and
- (iv) Corporations.

(i) Person of unsound mind : This may negative criminal responsibility in a number of ways. There are two main aspects to be considered ; either the condition of the accused may be such that it amounts to insanity or it may be that he is suffering from such mental abnormality as to diminish his responsibility.

In English law insanity may excuse at three possible stages. First, during custody before trial; when this happens the Home Secretary is entitled under the provisions of Mental Health Act, 1983, provided that, amongst other things; he considers it in the public interest so to do to have the accused in hospital. In which case of course, unless he recovers, he will not be tried at all. The second

place, although brought to trial the accused may be found unfit to plead. Here the issue is whether he is capable of understanding the conduct of the trial; that question must be tried by a specially impanelled Jury. If he is then found unfit the Court must order his detention in a hospital designated by the Home Secretary.

In the third place Insanity may be pleaded as a defence to the crime charged. In this sense "insanity" was defined in the well known rules laid down by the judges in M'Naghten's case. These rules may be summarized thus : --

- (a) Every person is presumed to be sane until the contrary is proved ;
- (b) It is defence to prove that, at the time of the commission of the act constituting the offence charged, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act, or (if he did know this) that what he was doing was wrong ;
- (c) Where a criminal act is committed by a man under some insane delusion as to the surrounding facts, which conceals from him the true nature of the act he is doing, he is under the same degree of responsibility as if the facts were as he imagined them to be.

Normally the burden of proof lies on the prosecution throughout a criminal trial, but the pre-emption of sanity creates an exception to this rule; for where insanity is pleaded the defence must establish on a balance of probabilities that the accused was insane.

Where at the trial of an accused person the jury finds him to be sane within the meaning of M'Naghten Rules at the time when he committed the crime charged, a special verdict of "not guilty by reason of insanity" will be returned and he will be detained during Her Majesty's pleasure. Until recently a finding of insanity being regarded as an acquittal, there was no appeal against the verdict. This was unsatisfactory because not only did not finding condemn the accused to indefinite confinement but it also precluded the possibility of his succeeding upon some other difference (e.g. Section 8 alibi) which he might.

Uncontrollable impulse is not recognised as a defence in English Law. But the proof that the accused acted under such an impulse may be a relevant matter to consider, because impulsive acts are symptomatic of some form of insanity. Hence proof of impulsive action may sometime be relevant to establish such disease of the mind as rendered the accused incapable of knowing the nature and guilty of his acts or that they were wrong.

This defence of diminished responsibility will be established when it can be proved on behalf of the accused, on a balance of probabilities, that he was suffering from such an abnormality of mind (whether arising from condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omission in doing or being a party to killing. It is the duty of the jury to consider the issue broadly and without reference to that "legal" insanity of M'Naughten Rules; in effect they must ask themselves, "Is the" accused without being insane, nevertheless on the borderline of insanity"? Medical evidence will be highly relevant but it need not be accepted by the jury as conclusive. Here, against though uncontrollable impulse is no defence proof of its existence may yet be relevant because it may suggest a state of diminished responsibility. Where, in a murder, trial, diminished responsibility is raised as a defence the prosecution may adduce evidence of insanity, and where insanity is raised, evidence of diminished responsibility. Further if the defence pleads to a murder, charge that the defendant is a person in of diminished responsibility and the plea is accepted by medical evidence a plea of guilty to man slaughter may be accepted.

Akin to the above defences is the plea of automatism. There is no doubt that when a person commits a crime while his mind is in a state of suspense he will not, at least in general, be held responsible for it. Instances are where, at any rate provided that his condition came about through no fault of his own, a man kills another while he is in hypnotic trance where unwittingly amounts another person after insulin has been administered to him. But for its defence, to succeed a reasonable foundation for it must be established such as evidence that the accused was in trance; normally the mere statement by the accused that his mind was a "blatant" world not be enough. But there such foundation has been established it will rest upon the prosecution to prove that the act was in fact voluntary if a conviction is to be obtained.

The difference between "automatism" and "insanity" as defences is that the latter rests, upon the fact of disease such as epilepsy "while the former arises from some external factor, such as drugs. Of course it must be observed that where the case is of insanity the special verdict of "not guilty by reason of insanity" must be returned, resulting in detention for the public safety.

(ii) **Drunken persons** : Earlier harsh laws have now been relaxed. In the first place it is now recognized that excessive drinking may induce actual all disease of the mind, as in the case of delirium tremens. Where actual disease is thus proved the accused will be treated in the same way as any other person of unsound mind, and the M Naghtin Rules will apply. In the second place proof of drunkenness which induces a state of mind falling short of Insanity

may sometimes serve to negative the existence of some particular kind of intent necessary for the establishment of guilt. For instance, malice aforethought being an essential element in the definition is of crime of murder where the accused can be proved to have been so drunk at the time of killing as not to be able to form any form of intent necessary to establish such malice he cannot be guilty of murder though such a state of mind induced by voluntary taking of drinks or drugs will be no excuse in the case of charge - such as one of assault where no specific intent need be proved; nor will it be an excuse where recklessness, rather than intent, has to be established. But of course the accused would be guilty of murder, whatever the effects of the alcohol, if he were first to form the intent to kill and then to get drunk in order to carry it out. It must be stress, that in this defence again, the onus is on the prosecution under the woolmington principle once there is some evidence before the Court that the defendant was drunk, the prosecution must establish that despite the drunkenness, the accused could, from the necessary intent and it is not the duty of the defence to prove the reverse:

On the other hand, where the fact of drunkenness is itself the essence of charge (as in the case of driving under the influence or of driving with an undue proportion of alcohol in the blood) it is of course, useless to call in aid the very thing that constitutes the offence in order to attempt to prove the absence of intention. Further, provided that the accused is capable, at the time of the commission of the crime charged, of forming the appropriate intent, it will be no excuse for him to show that alcohol affected his powers of self control induced him, for example, to give way to some violent passion to which he would not normally have succumbed. Thus we shall see that in certain circumstances homicide may be reduced from murder to man-slaughter where it can be proved that the accused acted under provocation; but it will not avail him to show that being drunk, he was more easily provoked than he would have been had he been sober.

(iii) **Minor :** (The principle of *Doli incapax*) upto the age of ten no one can be held guilty of any criminal offence. A child of over ten and under fourteen is presumed to be capable of forming a criminal intent; but this presumption may be rebutted by evidence which proves that he knew that what he was doing was seriously wrong. Further no boy of under fourteen can be held guilty of rape of unlawful carnal knowledge for there is an irrebutable presumption that he is incapable of committing these offences. It is interesting to note that the age of complete criminal incapability at common law, was seven years; it was raised by statute to eight and then, again, subject to the rebuttability of the presumption noted above.

(iv) **Corporations :-** Under the old common law, when a large number of crimes were punishable by death, it was generally

accepted that corporation could not be held liable for crimes committed by their servants or agents for, as it was said you cannot heal the commons seal" and corporations could not be indicted.

In-recent times there has, however, been an increasing tendency to hold corporations criminally responsible for the acts of their servants or agents committed in the course of their employment. They have, for example, been indicated for conspiracy and for infringement of tax regulations. How far the Courts will go in, thus, removing corporate immunity in criminal matters still remains to be seen, it is clear that there must be some limit to the relaxation of the older rules, for the artificial nature of corporations precludes their imprisonment just as much as the hanging of them, indeed, they can only be punished by fine. Moreover, it is unlikely that the in intention to commit such crimes as rape or murder will ever be imputed to corporations.

Q. 11. Discuss various limitations to mistake of fact as defence to a criminal charge in detail?

Ans. MISTAKE OF FACT AS A DEFENCE TO CRIMINAL CHARGE : It will usually be a defence to a criminal charge for the accused to prove that he acted under a mistake of fact. But this rule is subject to three limitations:-

- (a) The mistake must be such that, had the true facts been as the accused believed them to be, he would not have been guilty of the offence in question. Thus it will not be a defence for a man who is accused of stealing a gold watch to prove that he thought it was a silver one or that it was some other valuable object ; but it will be a defence, as will appear for him to prove that he honestly believed (contrary to the true facts) that the watch was his own.
- (b) The mistake must be reasonable. So that if a sane man were to cut off another man's ear and to plead that he imagined that the knife which he used was a magic one, which would cause a new and better ear to grow in place of the old one, his ridicule belief could afford him no defence.
- (c) Mistake can only be relied upon where the alleged error relates to some fact or facts essential to the charge. Thus is *R. V. Hibbert (1869) L.R.ICCR 184*, H seduced a girl of fourteen. He was charged, under the offences against the Person Act 1861, Section 55, with the offence of taking an un-married girl under the age of sixteen out of possession of her parents. There was no evidence to show that the girl had any parents, and

she was in fact at the time in custody of her father. He was convicted, but the conviction was subsequently quashed (i.e. annulled on appeal) because on the facts as he believed them to be H had committed no offence; for he did not know that the girl had any parents. In *R. v. Prince* on the other hand P's conviction upon a charge under the same section was upheld; he had reasonable grounds for believing that the girl whom he seduced was over sixteen (though fact she was not) but he did, nevertheless, know that she was in the custody of her father. His mistake as to her age had no relevance to the offence charged; he made no mistake in relation to the crucial fact that he had taken her out of her father's care.

- (d) In the case of "absolute" offence mistake is no defence. Thus in *R. v. Miller*, it was held that a person charged with driving on the road while disqualified cannot escape liability by proving that he honestly (but mistakenly) believed that he was on private land.

Mistake is not mere forgetfulness. It is a slip "made not by design but by mistake". Honest and reasonable mistake stands in fact on the same footing as absence of a reasoning faculty, as infancy, or perversion of that faculty, as in lunacy.

When the question of justification of an offence either due to mistake of fact or mistake of law arises, the guiding rules are:

- (1) that when an act is in itself plainly criminal and is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence;
- (2) that where an act is *prima facie* innocent and proper, unless certain circumstances co-exist, these ignorance of such circumstances is the answer to the charge;
- (3) that the state of defendant's mind must amount to absolute ignorance of the existence of the circumstances which alter the character of the act, or to a belief in its non-existence;
- (4) where an act which is in itself wrong, is under certain circumstances criminal, person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime;
- (5) where statute makes it penal to do an act under certain circumstances, it is a question, upon the wording and object of the particular statute, whether the

responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial.

Q. 12. What do you understand by the "Principles" Legality" and presumption of innocence? Discuss.

Ans. PRINCIPLES LEGALITY : The fundamental principle of criminal law is that no one can be found guilty of an offence without his having violated some pre-determined law defining a prohibited conduct. The principle is expressed by the maxim "*nullum peona sine lege*". In other words, unless there is violation of some existing law defining a crime clearly and unequivocally, no crime is committed : The Constitution of Islamic Republic of Pakistan, 1973, provides:-

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, or be subjected to a penalty greater than which might have been inflicted under the law in force at the time of the commission of the offence. (Art. 12).

The provision manifests what can be called the "great charter of liberty" in countries having the rule of law. The position of totalitarian countries indifferent which can be illustrated with reference to the position obtaining under the Nazi rule in Germany;

"Whoever commits an act on which the law declares to be punishable which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished according to the law, the basic idea of which fits its best".

Presumption of innocence : There are two systems; i.e., accusational and inquisitorial systems, followed in different parts of the world in the administration of criminal justice. In the accusational system followed in common law countries, the burden of proving that an accused person violated some law is on the prosecution while in the inquisitorial system which is followed in some European countries like France, it is for the accused person to prove that he is not guilty of the crime allegedly committed by him.

In Pakistan where the accustorial system is followed that is a presumption in favour of the accused that the offence has not been committed by him and the presumption continues to be perative until the prosecution is able to prove its case according to the rules of procedure and evidence prescribed by law. The same principle has been incorporated in Qanun-e-Shahadat, 1984.

Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist [Art. 117].

The life and liberty of the individual would be in jeopardy if the rule was otherwise. The principle is sometimes expressed by saying that to be on the safer side, the acquittal of ten guilty persons is to be preferred to the conviction of a single innocent person. A very high standard of proof is, therefore, required to establish the culpability of an accused person. The distinction between the standard of proof in civil and criminal proceedings has been brought about in the following words:-

"A higher minimum of proof is necessary to support an accusation of crime than will suffice when the charge is only of a civil nature. For in the latter it is sufficient that there be a preponderance of evidence in favour of the successful, whereas in criminal cases the burden rests on prosecution to prove that the accused is guilty beyond reasonable doubt."
[Kenny Page 501]

The proof beyond reasonable doubt does not, however, imply that the prosecution must eliminate even the faithful and fantastic doubts regarding the criminality of the accused person. In *Miller v. Minister of Pensions*, Lord Denning observed ;

The degree of cogency need not reach certainty, but it, must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Once the prosecution has proved its case the burden is on the accused, though his burden of proof is not as exacting as that of the prosecution to disprove the prosecution case is to prove that the act committed by him is covered by one of the general exceptions provided in the Pakistan Penal Code. Article 127 of the Qanun-e-Shahadat, provides:-

When a person is accused of any offence, the burden of proving the existence of the circumstances bringing the case within any of the general exceptions in the Pakistan Penal Code, or within any special exemption or proviso contained in any other part of the same code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstance.

Q. 13. What elements are to be taken into conviction in determining Criminal liability' and Appropriate measure of punishment in a case?

Ans. CRIMINAL LIABILITY AND MEASURE OF PUNISHMENT : In consider the measure of criminal liability it will be convenient to bestow exclusive attention upon the deterrent purpose of the criminal law, remembering, however, that the conclusion so obtained are subject to possible modification by reference to those other purposes of punishment which we, thus, provisionally disregard.

If men were perfectly rational so as to act invariably in accordance with /an enlightened estimate of consequences, the question /of the measure of punishment would present no difficulty. A draconian simplicity and severity would be perfectly effective. It would be possible to act an the stoic paradox that all offences involve equal guilt, and to visit with the utmost rigour of the law every deviation, however slight from the appointed way.

In other words, if the deterrent effect of severity were certain and complete, the most efficient law would be that which by the most extreme and in discriminating severity, effectually extinguished crime, were human nature so constituted that a threat of learning all offenders alive would with certainty prevent all breaches of the law, there this would be an effective penalty for all offences from high treason to petty larceny. So greatly, however, are men moved by the impulse of the movement, rather than by rational estimate of future good and evil, and so ready are they to face any future evil which falls short of the inevitable, that the most rigour is sufficient only for the discrimi-nation of crime, not for the extinction of it. It is needful, therefore, in judging the merits of the law, to substract. from the sum of good which results, from the partial prevention of offences, the sum of evil which results from the partial failure of prevention and the consequent necessity of fulfilling those threats of evil by which the law had hoped to effect purpose. The perfect law is that in which the difference between the good and the evil is at a maximum is favour of the good, and the rule as to the measure of criminal liability are the rules for the attainment of this maximum. It is obvious that it, is not attainable by an indefinite increase of severity. To substitute hanging for imprisonment as the punishment for petty theft would doubtless diminish the frequency of this offence, but it is certain that the evil so prevented would be far out-weighed by that which the law would be called on to inflict in the case in which its threats proved unavailing.

In every crime there are three elements to be taken into account in determining the approximate measure of punishment. These are:--

- (1) The motives to the commission of the offence;--
- (2) The magnitude of the offence ; and
- (3) The character of the offender.

(i) **Motive to Commission of the offence :** Other things being equal the greater the temptation to commit a crime the greater should be the punishment. This is an obvious deduction from the first principles of Criminal liability. The object of punishment is to counter by the establishment of contrary and artificial motives the natural motives which lead to crime. The stronger these natural motives the stronger must be the counteractives which the law supplies. If the profit to be derived from the crime is great or the passions which lead men to it are violent a corresponding strength of violence is an essential condition of the efficacy of repressive discipline. This principle, however, is subject to a very important limitation, and that there are many cases in which extreme temptation is a ground of extenuation rather than of increased severity of punishment.

(ii) **Magnitude of the offence :** Other things being equal. The greater the offence, that, is to say the greater the sum of its evil, consequences or tendencies, the greater should be its punishment. At first sight indeed it would seem that this consideration is irrelevant. Punishment it may be stated, should be measured solely by the profit derived by the offender, not by, the evil, caused to other persons; if two crimes are equal in point of motive, they should be equal in point of punishment, notwithstanding the fact that one of them may be many times, more mischievous than the other. This, however, is not so and the reason is two fold:

- (a) The greater the mischief of any offence the greater is the punishment which it is profitable to inflict with the hoping of preventing it. The greater the mischief, the less is the proportion which the evil of punishment bears to the good of prevention, and, therefore, the greater is the punishment which can be inflicted before the good over evil attains its maximum. Assuming the motive of larceny and of the homicide is be equal, it may be profitable to inflict capital punishment for the latter offence, although it is containing unprofitable to inflict for the former. The increased measure of prevention that would be obtained by such severity would, in view of the comparatively trivial nature of the offence, be obtained at too great a cost.
- (b) A second subordinate reasons for making punishment vary with the magnitude of the offence is that, in those cases in which different offences offer themselves as alternative to the offender, an inducement is thereby given for the preference of the least serious. If the

punishment of burglary is the same as that of murder, the burglar has the obvious motives for not stopping at the lesser crime. If an attempt is punished as severely as a completed crime, why should any man repent of his half executed purposes.

(iii) **Character of the offender :** The worse the character or disposition of offender the more severe should be his punishment. Badness of disposition is constituted either by the strength of the impulses to crime, or by the weakness of impulse towards law-abiding conduct. One man may be worse than another because of the greater strength and prevalence within him of such anti social passion as anger, covetousness, or malice or his badness may be in a deficiency of those impulses and instincts which are the springs of the right conduct in normally constituted men. In respect of all the graver forms of law breaking, for one man who obtains from them for fear of the law there are thousands who abstain from them for fear of law there are thousands who abstain by reason of quite other influences. Their sympathetic instinct, their natural affections their religious beliefs, their love of the approbation of others, their pride and self respect, render superfluous the threatening of the law. In the degree in which these impulses are dominant and operative, the disposition of a man is good; in the degree in which they are waning, or inefficient, it is bad.

In both its kinds badness of disposition is a ground for severity of punishment. If a man's emotional constitution is such that the normal temptation acts upon him with abnormal force, it is for the law to supply in double measure the counteractive of penal discipline. If he is so made that the normal influences towards well doing fall below the level of average humanity the law must supplement them by artificial influences of a strength that is needless in ordinary cases.

Any fact, therefore, which indicates depravity of disposition is a circumstance of aggravation, and calls for a penalty in excess of that which would otherwise be appropriate to the offence, one of the most important of these facts is the repetition of crime by one who has been already punished. The law rightly imposes upon habitual offenders, penalties which bear no relation either to the magnitude or to the profit of the offence. A punishment adapted for the normal man is not appropriate for those, who, by their repeated defiance of it, prove their possession of abnormal natures. A second case in which the same principle is applicable is that in which the mischief of an offence is altogether disproportionate to any profit to be derived from it by the offender. To kill a man from mere wantonness, or merely in order to facilitate the picking of his pocket, is a proof of extraordinary depravity beyond anything that is imputable to him who commits homicide only through the stress of

passionate indignation or under the influence of great temptation. A third case is that of offence from which normal humanity is adequately dissuaded by such influences as those of natural affection. To kill one's father is in point of magnitude no worse a crime than any other homicide, but it has at all times been viewed with greater abhorrence, and by some laws punished with greater severity, by reason of the depth of depravity which it indicates in the offender. Lastly it is on the same principle that wilful offences are punished with greater rigour than those which are due merely to negligence.

An additional and subordinate reason for making the measure of liability depend upon the character of the offender is that badness of disposition is commonly accompanied by deficiency of sensibility. Punishment must increase as sensibility diminishes. The more depraved the offender the less he feels the shame of punishment; therefore; the more he must be made to feel the pain of it. A certain degree of such physical insensibility is said to characterise those who commit crimes of violence; and the indifference with which death itself is faced by those who in the callousness of their hearts have not scrupled to inflict upon others is a matter of amazement to normally constituted men.

We are now in a position to deal with a question which we have already touched upon but differed for fuller consideration, namely the apparent paradox involved in the rule that punishment must increase with the temptation to the offence. As a general rule this proposition is true; but it is subject to a very important qualification. For in certain cases the temptation to which a man succumbs may be of such a nature as to rebut that presumption of bad disposition which would in ordinary circumstances arise from the commission of the offence. He may for example be driven to the act not by the strength of any bad or self-regarding motives, but by that of his social sympathetic impulses. In such a case the greatness of the temptation, considered in itself, demands severity of punishment but when considered as a disproof of the degraded disposition which usually accompanied wrongdoing it demands leniency; and the later of these two conflicting considerations may be sufficient importance to outweigh the other. If a man remains honest until he is driven in despair to steal food for his straving children, it is perfectly consistent deterrent theory of punishment to deal with him less severely than with him who steals from no other motive than cupidity. He who commits homicide from motives of petty gain, or to attain some trivial purpose, deserves to be treated with the utmost severity, as a man thoroughly callous and depraved. but he who kills another in retaliation for some intolerable insult or injury need not be dealt with according to the measure of his temptations, but rather be excused on account of them.

Q. 14. Write a short note on "Theory of Strict Liability"?

Ans. THEORY OF STRICT LIABILITY : We now proceed to consider the third class of wrongs, namely those of strict liability. These are the acts for which a man is responsible irrespective of the existence of either wrongful intent or negligence. They are the exceptions to the general requirement of fault. It may be thought indeed, that in the civil as opposed to the criminal law, strict liability should be the rule rather than the exception. It may be said "It is clear that the criminal law liability should in all ordinary cases be based upon the existence of *mens rea*. No man should be punished criminally unless he knew that he was doing wrong or unless, at least, a reasonable person in his shoes could have avoided the harmful result by taking reasonable care. Inevitable mistake or accident should be a good defence. But why should the same principle apply civil liability? If I do another man harm, why should I not be made to pay for it? What does it matter to him whether I did it wilfully, or negligently, or by inevitable accident? In either case I have actually done the harm, and therefore should be bound to undo it by paying compensation. For the essential aim of civil proceedings is redress for harm suffered by the plaintiff, not punishment for wrong done by the defendant; therefore the rules of *mens rea* should be deemed inapplicable".

It is clear, however, that this is not the law of England, and it seems equally clear that there is no sufficient reason why it should be. For unless damages are at the same time a deserved penalty inflicted upon the defendant, they are not to be justified as being a deserved recompense awarded to the plaintiff. In the first place they in no way undo the wrong or restore the former state of things. The wrong is done and cannot be undone. If by accident I burn down another man's house, the only result of enforcing compensation is that the loss has been transferred from him to me; but it remains as great as ever for all that. The mischief done has been in no degree abated. Secondly, the idea of compensation is related to that of fault, for it consist in the restoring of a balance by the person who has disturbed it; but if the defendant from whom compensation is sought is not at fault, he can hardly be taken to have disturbed the balance which needs to be redressed. If I am not in fault, there is no more reason why should I insure other persons against the harmful issues of my own activity, than why I should insure them against lightning or earthquakes. Unless some definite gain is to be derived by

transferring loss from one head to another, sound reason, as well as the law, requires that the loss should lie where it falls.

EXTENT OF STRICT LIABILITY : Although the requirement of fault is general throughout the civil and criminal law, there are numerous exceptions to it. The considerations on which these are based are various, but the most important is the difficulty of procuring adequate proof of intention or negligence. In the majority of instances, indeed, justice requires that this difficulty be honestly faced; but in certain special cases it is circumvented by a provision that proof of intention or negligence is unnecessary and that liability is strict. In this way we shall certainly punish some who are innocent, but in the case of civil liability this is not a very serious matter since men know that in such cases they act at their peril, and are content to take the risk while in respect of criminal liability such a provision applies only in the case less serious offences. Whenever, therefore the strict doctrine of *mens rea* would too seriously interfere with the administration of justice by reason of the evidential difficulties involved in ... the law tends to establish a form of strict liability. Nevertheless, strict liability in criminal law remains open to serious objection. ⁴A man should, we feel, be given a reasonable chance to conform his conduct to the requirements of law. It is true that some mistakes and some accidents are culpable and would not have occurred but for the defendant's negligence. Others however, could not have been avoided however much care had been taken, and to penalise a man for unavoidable mistakes or accidents is to fail to afford him a reasonable opportunity of complying with the law. The difficulty of procuring adequate proof of intention or negligence could be met quite simply by allowing the defendant to shoulder the burden of proving his innocence. In this event it would be for him to show that he acted neither intentionally nor through negligence and that any accident or mistake on his part was not culpable. This unfortunately is not the present position in English law, which recognises many offences of strict liability.

In proceeding to consider the chief instances of strict liability we find that the matter falls into three divisions namely:

- (1) Mistake of Law.
- (2) Mistake of fact, and
- (3) Accident.

Mistake of Law : It is a principle recognised not only by our own but by other legal systems that ignorance of the law is no excuse for breaking it. *Ignorantia juris neminem excusat*. The rule is also expressed in the form of a legal presumption that every one knows the law. The presumption is irrebuttable ; no diligence of inquiry will avail against it, and no inevitable ignorance or error will serve for justification. Whenever a man is thus held accountable for breaking a law which he did not know, and which he could not by due care have acquired a knowledge of, we law a type of strict liability.

The reasons rendered for this some-what rigorous principle are three in number. In the first place, the law is in legal theory definite and knowable, it is the duty of every man to know that part of it which concern him, therefore innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it because in general they can and ought to know it.

In the second place, even if invincible ignorance of the law is in fact possible as indeed it is, the evidential difficulties in the way of the judicial recognition of such ignorance are insuperable, and for the sake of any benefit derivable therefrom it is not advisable to weaken the administration of justice by making liability dependent on well nigh inscrutable conditions touching knowledge or means of knowledge of the law. Who can say of any man whether he knew the law, or whether during the course of his past life he had an opportunity of acquiring a knowledge of it by the exercise of due diligence ?

Thirdly the lastly, the law is in most instances derived from and in harmony with the rules of natural justice. It is a public declaration by the state of its intention to maintain by force those principles of right and wrong which have already a secure place in the moral consciousness of men. The common law is in great part is nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he know very well in most cases that is breaking the rule of right. If not to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts. He who goes about to harm others when he believes that he can do so within the limits of the law, may justly be required

by the law to know those limits at his peril. This is not a form of activity that need to be encouraged by any scrupulous insistence on the formal conditions of legal responsibility.

It must be admitted, however that while each of these considerations is valid and weighty, they do not constitute an altogether sufficient basis for so stringent and severe a rule. None of them goes the full length of the rule. That the law is knowable throughout by all whom it concerns is an ideal rather than a fact in any system as indefinite and mutable as our own. That it is impossible to distinguish invincible from negligent ignorance of the law is by no means wholly true. It may be doubted whether this inquiry is materially more difficult than many which Courts of justice undertake without hesitation; and here again the difficulty of proving the defendant's knowledge of the law could be surmounted by providing that the defendant should bear the burden of establishing non-negligent ignorance. That he who breaks the law of the land disregards at the same time the principles of justice and honesty is in many instances far from the truth. In a complex legal system a man requires other guidance than that of common sense and a good conscience : The fact seems to be that the rule in question while in general sound, does not in its full extent and uncompromising rigidity admit of any sufficient justification. Indeed, it may be said that certain exceptions to it are in course of being developed particularly in respect of the defence of "claim of right" in criminal law.

Mistake of fact : In respect of the influence of ignorance or error upon legal liability, we have inherited from Roman law a familiar distinction between law and fact. By reason of his ignorance of the law no man will be excused, but it is commonly said that inevitable ignorance of fact is a good defence. This, however, is far from an accurate statement of English law. It is much more nearly correct to say that mistake of fact is an excuse only within the sphere of the Criminal law, while in Civil law responsibility is commonly strict in this respect. So far as civil liability is concerned it is a general principle of our law that he who intentionally or semi-intentionally interferes with the person, property, reputation, or other rightful interests of another does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstances which justified his act. If I trespass on another man's land, it is no defence to me that I believed it on good ground to be my own. If an absolute innocence

and under an inevitable mistake instead, I am liable to him, notwithstanding the greatest care taken by me to ascertain his identity. If I falsely but innocently make a defamatory statement about another, I am liable to him, however careful I may have been ascertain the truth. There are, indeed, exceptions to this rule of strict civil liability for mistake of fact, but they are not of such number or importance as to cast any doubt on the validity of the general principle.

In the criminal law, on other hand the matter is otherwise, and it is here that the contrast between mistake of the law and mistake of fact finds its true application. Absolute criminal responsibility for a mistake of fact is quite exceptional. An instance of it is the liability of him who abducts a girl under the legal age of consent. Inevitable mistake as to her age is no defence; he must take the risk.

A word may be said as to the historical origin of this failure of English law to recognise inevitable mistake as a ground of exemption from civil liability. Ancient modes of procedure and proof were not adapted for inquiries into mental conditions. By the practical difficulties of proof early law was driven to attach exclusive importance to overt acts. The subjective elements of wrongdoing were largely beyond proof or knowledge, and were therefore disregarded as far as possible. It was a rule of our law that intent and knowledge were not matters that could be proved or put in issue. "It is common learning", said one of the Judges of King Edward IV, that the intent of a man will not be tried, for the devil himself knoweth not the intent of a man". The sole question which the Courts would entertain was whether the defendant did the acts complained of. Whether he did it ignorantly or with guilty knowledge was entirely immaterial. This rule however, was restricted to civil liability. It was early recognised that criminal responsibility was too serious a thing to be imposed upon an innocent man simply for the sake of avoiding a difficult inquiry into his knowledge and intention. In the case of civil liability, on the other hand, the rule was general. The success with which it has maintained itself in modern law is due in part to its undeniable utility in obviating inconvenience or even impracticable inquiries and in part to the influence of the conception of redress in minimising the importance of fault as a condition of penal liability.

Accident : Unlike mistake, inevitable accident is commonly recognised by our law as a ground of exemption from liability. It is needful, therefore, to distinguish accurately between these two things, for they are near of kin. Every act which is not done intentionally is done either accidentally or by mistake. It is done accidentally when the consequences are intended. It is done by mistake, when the consequences are unintended but the actor is ignorant of some material circumstances. If I drive over a man in the dark because I do not know that he is in the road, I injure him not accidentally, but by mistake. In the former case I did not intend the harm at all, while in the latter case I fully intended it, but falsely believe in the existence of a circumstance which would have served to justify it. So if by insufficient care I allow my cattle to escape into my neighbour's field, their presence there is due to accident; but if I put them there because I wrongly believe that the field is mine, their presence is due to mistake. In neither case did I intend to wrong my neighbour, but in the one case my intention failed as to the consequences, and in the other as to the circumstance.

Accident, like mistake, is either culpable or inevitable. It is culpable when due to negligence, but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. Inevitable accident is commonly a good defence, both in the civil and in the criminal law.

To this rule, however there are at least, in the civil law, important exceptions. These are cases in which the law insists that a man shall act as his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts, or to construct a reservoir of water, or to accumulate upon his land any substance which will do damage to his neighbour if it escapes, he will do all these things *suo periculo* (though none of them are *per se* wrongful) and will answer for all ensuing damage, notwithstanding consummate care. So also every man is strictly responsible for the trespasses of his cattle. If my horse or my ox escapes from my land to that of another man. I am answerable for it without any proof of negligence.

Q. 15. Write a note in detail on:?

"Subjective and objective theories of negligence."

Ans. NEGLIGENCE : There are two rival theories of the meaning of the term 'negligence'. According to the one, negligence is a state of mind; according to the other, it is not a state of mind but

merely a type of conduct. The opposing view may conveniently be distinguished as the subjective and objective theories of negligence. The one view was adopted by Sir John Salmond, the other by Sir Frederick Pollock.

(i) **Subjective theory of negligence :** Sir John Salmond's view was that a careless person is a person who does not care. Although negligence is not synonymous with thoughtfulness inadvertence, it is nevertheless on this view, essentially an attitude of indifference. Indifference, however, is exceedingly apt to produce thoughtless or inadvertence; but it is not the same thing, and may exist without it. If I am indifferent as to result of my conduct I shall very probably fail to acquire adequate foresight and consciousness of them; but I may on the contrary, make a very accurate estimate of them, and yet remain equally indifferent with respect of them.

Negligence, therefore, on this view essentially consists in the mental attitude of indifference with respect to one's conduct and its consequences.

(ii) **Objective theory of negligence :** The other theory is that negligence is not a subjective but an objective fact. It is not a particular state of mind or form of the *mens rea* at all, but a particular kind of conduct. It is a breach of duty of taking care, and to take care means to take precautions against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct. The drive at night without lights is negligence, because to carry lights is a precaution taken by all reasonable and prudent men for the avoidance of accidents. To take care, therefore, is no more a mental attitude or state of mind than to take cold is. This view obtains powerful support from the Law of Tort, where it is clearly settled that negligence means the failure to achieve objective standard of the reasonable man. If the defendant has failed to achieve this standard it is no defence for him to show that he was anxious to avoid doing harm and took the utmost care of which he was capable. The same seems to be hold good in criminal law.

The truth contained in subjective theory is that in certain situations any conclusions as to whether a man had been negligent would depend partly on conclusions as to his state of mind. In criminal law a sharp distinction is drawn between intentionally causing harm and negligently causing harm, and in deciding whether the accused is guilty of either we must have regard to his knowledge, aims, motives and so on.

Cases of apparent negligence may, upon examination of the party's state of mind, turn out to be cases of wrongful intention. A trap door may be left unbolted, in order that one's enemy may fall through it and so die. Poison may be left unlabelled with intent that someone may drink it of mistake. A ship's captain may wilfully cast away his ship by the neglect of the ordinary rules of good seamanship. A father who neglects to provide medicine for his sick child may be guilty of wilful murder, rather than of mere negligence. In one of these cases, nor indeed of any others, can we distinguish between intentional and negligent wrong-doing, save by looking into the mind of the offender and observing his subjective attitude towards his act and its consequences. Externally and objectively, the two classes of offences are distinguishable.

The subjective theory then has the merit of making clear the distinction between intention and negligence. The wilful wrong-doer desires the harmful consequences, and therefore, does the act in order that they may ensue. The negligent wrong-doer does not desire the harmful consequences, but in many cases is careless if not wholly yet unduly) whether they ensue or not, and therefore, does the act notwithstanding the risk that they may ensue. The wilful wrong-doer is liable because he desires to do the harm; the negligent wrong-doer may be liable because he does not sufficiently desire to avoid it. He who will excuse himself on the ground that he meant no evil is still open to the reply; perhaps you did not, but at all events you might have avoided it if you had sufficiently desired to do so; and you are held liable not because you were careless and in different whether it ensued or not.

But to identify negligence with any one state of mind is a confusion and an over simplification. We have seen that negligence consists in failure to comply with a standard of care and that such failure can result from a variety of factors including insurance, inadvertence and clamminess. Now while it is true that these may often result from indifference, there is no reason to suppose that they must in all cases arise from this source. To imagine otherwise is to salvage the subjective theory that negligence consists in the mental attitude of indifference at the expense of adopting a hypothesis which has no particular plausibility and no special merit other than that of supporting the subjective theory itself. In fact if wrongful intention is not in issue, and the question is simply whether the defendant caused the harm without any fault on his part or by his unintentional fault, the question is to be settled by

ascertaining whether his conduct conformed to the standard of the reasonable man. In this case the state of his mind is not quite irrelevant. For the standard of care represents the degree of care which should be used in the circumstances, and his knowledge or lack of knowledge may be relevant in assessing what the circumstances were. The question may then be whether a reasonable man, knowing only what the defendant knew, would have acted as did the defendant.

But this state of mind is not conclusive. In certain circumstances it may be held in law that a reasonable man would know nothing that the defendant did not know, and the defendant will be harmed for not knowing and held liable because he ought to know. In such cases the law relating to negligence requires the defendant of *lis per lite* to come up to an objective standard and decline to take his personal equation into account.

Q. 16. How stages are involved in the commission of a crime?

Ans. If a person commits a crime voluntarily or after premeditation the doing of it involves four stages. These four stages are: (i) intention, (ii) preparation, (iii) attempt, and (iv) accompanied or commission of crime.

1. INTENTION OR CONTEMPLATION : It is the first stage in the commission of the offence in other times mere intention (excepting in few cases) was not punishable. "In order to constitute an attempt to commit a crime there must be something more than an intent to commit it." The obvious reason for not pursuing the accused at this stage is that it is very difficult for the prosecution to prove the guilty intention of a man. The Courts have shown their unwillingness in punishing a man for mere guilty intention. Therefore so long as an act of a person rests in his intention no criminal liability arises. But if his intention is made known to others either by words or conduct it will give rise to criminal responsibility. Under criminal law also mere intention to commit an offence is not punishable.

2. PREPARATION : Preparation is the Second Stage in the commission of a crime. It means to arrange means or measure necessary for the commission of the intended criminal act. An act done towards the commission of an offence, which does not lead inevitably to the commission of the offence unless it is followed by

other acts, is merely an act of preparation. Intention alone or intention followed by preparation is not enough to constitute the crime. Preparation has not been made punishable because in most of the cases the prosecution has failed to prove the necessary preparations were made for commission of the offence. If A purchases a pistol and keeps the same in his pocket duly loaded in order to kill him either enemy, B, but does nothing more. A has not committed any offence as he is still at the stage of preparation and will be impossible for prosecution to prove that A was carrying the loaded pistol only for the purpose of killing B. It is so since it is not necessary that whosoever makes the preparation will actually commit the offence also. The law allows a *locus poenitentiae* (opportunity to repent) and does not punish the person unless he has passed beyond that stage of preparation.

Under the Pakistan Penal Code, mere preparation to commit the following offences is punishable as these are considered to be grave offences:

- (1) Preparation to wage war against the Government (S. 122);
- (2) 'Preparation to commit depredation on territories of a power at peace with Pakistan (S. 126); (3) Preparation to commit dacoity (S. 399); (4) Preparation for counterfeiting of coins or Government stamps (Ss. 233 to 235, and 257); (5) Possessing counterfeit coins, false weight or measurement and forged documents. Mere possession of these is a crime and no possessor can plead that he was still at the stage of preparation (Ss. 242, 243, 259, 266 and 274).

Q. 17. Differentiate between Substantive Law and Law of Procedure?

Ans. SUBSTANTIVE LAW AND THE LAW OF PROCEDURE. It is no easy task to state with precision the exact nature of the distinction between substantive law and the law of procedure and it will conduce to clearness if we consider a plausible but erroneous explanation. In view of the fact that the administration of justice in its typical form consists in the application of remedies to the violation of rights, it may be suggested that, substantive law is that which defines the rights while procedural law determines the remedies. This application, however, of the distinction, between *jus* and *remedium* is inadmissible. For in the first place there are many rights (in the wider sense) which belong to the sphere of procedure; for example a right of appeal; a right to give evidence on one's own behalf, a right to interrogate the other party and soon. In the second place rules defining the remedy

may be as much a part of the substantive law as are those which define the right itself. No one would call the abolitions of capital punishment for instance a change in the Law of Criminal Procedure. The substantive part of criminal law deals with not the crimes alone, but with punishments also.

So in the civil law, the rules as to the measure of damages pertain to the substantive law, no less than those declaring what damage is actionable, and rules determining the classes of agreements which will be specifically enforced are as clearly substantive as those determining the agreements which will be enforced at all.

To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available.

What, then is the true nature of the distinction? The law of Procedure may be defined as that branch of law which governs the process of litigation. It is the law of *actus--Jus quod ad actiones pertinet* using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject matter. Subjective law is concerned with ends which the administration of justice seeks, procedural law deals, with the means and instruments by which those ends are to be achieved. The latter regulates the conduct and relations of Courts of litigants in respect of the litigation itself, the former determines their conduct and relations in respect of the matters litigated.

A glance at the actual contents of the Law of Procedure will enable us to judge of the accuracy of this explanation. Whether I have a right to recover any property is a question of substantive law, for the determination and the protection of such laws, are among the ends of the administration of justice; but what Courts and within what time I must institute proceedings are questions of procedural law, for they merely relate to the modes in which the Courts fulfil their functions. What facts constitute a wrong is determined by the substantive law; what facts constitute the proof of a wrong is a question of procedure. For the first relates to the subject matter of the litigation; the second to the process merely, what an offence is punishable by fine or by imprisonment is a question of substantive law, for the existence and measure of criminal law are matters pertaining to the end and purpose of the administration of justice.

But whether an offence is punishable summarily or an indictment is a question of procedure. Finally it may be observed that; whereas. The abolition of capital punishment would be an alternation of substantive law, the abolition of punishment for debt was merely an instrument for enforcing payment.

So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, what, the law of procedure defines the mode, and the conditions of the application of the one to the other.

Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure, which, in their, practical operation, are wholly and substantially equivalent to rules of substantive law. In such cases difference between these two branches of the law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issue. In legal history such transitions are frequent, and in legal theory they are not without interest and importance.

Of these equivalent procedural and substantive principles there are at least three classes sufficiently important to call for notice here:

- (1) An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing.
- (2) A conclusive evidential fact is equivalent to and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law. That a child under the age of eight years is incapable of criminal intention is a rule of evidence but differs only in form from the substantive rule that no child under that age is punishable for a crime. That the acts of a servant done about his master's business are due with his masters authority is a conclusive presumption of law, and pertains to

procedure ; but it is the forerunner and equivalent of our modern substantive law of employers' liability. A bond (that is to say an admission of indebtedness under seal) was originally operative as being conclusive proof of existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of substantive law.

- (3) The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in serving the bond between right and remedy ; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect in English domestic law is the same, although their form is different.

The normal elements of judicial procedure are five in number, namely, Summons, Pleading, Proof, Judgment and Execution. The object of the first is to secure for all parties interested on opportunity of presenting themselves before the Court and making their case heard. Pleading for immunities for the use of the Court and of the parties those questions of fact or law which are in issue. Proof is the process by which the parties supply the Court with the data necessary for the decision of those questions. Judgment is the decision itself, while execution, the last step in the proceeding, is the use of physical force in the maintenance of the judgment when voluntary submission is withheld. Of these five elements of judicial procedure one only, proof is of sufficient theoretical interest to repay such abstract consideration as in house in place.

Q. 18. Discuss and differentiate between "Motive and Malice"?

Ans. "MOTIVE" : A wrongful act is seldom intended and desired for its own sake. The wrong-doer has in view some ulterior object which he desires to obtain by means of it. The evil which he does to another, he does and desires only for the sake of some resulting good which he would obtain for himself. The desire for this good is the motive of his act.

Motives, though closely related and similar to intentions, differ from intentions in certain respects. First an intention relates to the immediate objectives of an act, while a motive relates to the

object or series of objects for the sake of which the act is done. The immediate intent of the thief is to appropriate another persons' money, while his ulterior objective may be to buy food with it or to pay a debt. Secondly, a man's motive for an act consists in a desire for something which will confer a real or imagined benefit of some kind on the actor himself, whereas his intention need not relate to some personal interest of this kind. The point of asking what a man intends is to discover what he is trying to achieve. The point of asking for his motive is to find out what personal advantage he is seeking to gain ; and a motiveless act is one aimed at no such personal advantage.

In explaining a man's motives we may sometimes describe them in either, specific or general terms. The thief in the example above may be said to steal to buy food, or to steal out of necessity. So acts may be said to be done for revenge, out of curiosity and so on, all of which are common mental states relating to a future state of affairs desired by the actor as in some way benefiting him. Intention cannot be described in such general terms.

The objective of one wrongful act may be the commission of another. I may make a die with intent to coin bad money; I may coin bad money with intent to utter it; I may utter it with intent to defraud. Each of these acts is or may be a distinct criminal offence, and the intention of any one of them is immediate with respect to that act itself, but ulterior with respect to all that go before it in the series.

A person's interior intent may be complex instead of simple, he may act from two or more concurrent motives instead of from only. He may institute a prosecution, partly from a desire to see justice done, but partly also from ill-will towards the defendant. He may pay one of his creditors preferentially on the eve of bankruptcy partly from a desire to benefit him at the expense of the others, and partly from a desire to gain some financial advantage for himself. Now the law, as we shall see later, sometimes makes liability for an act, for example, regards as fraudulent any payment made by a doctor immediately before his bankruptcy with intent to prefer one of his creditors to the others. In all such cases the presence of mixed or concurrent motives raises a difficulty of interpretation. The phrase "with intent to" or its equivalents, may mean any one of at least four different things:-

- (1) That the intent referred to must be the sole or exclusive intent;

- (2) that it is sufficient if it is one of several concurrent intents;
- (3) that it must be the chief or dominant intent, any others being subordinate or incidental;
- (4) that it must be a determining intent that is to say, an intent in the absence of which the act would not have done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case.

Malice : Closely connected with the law and theory of intentional wrong-doing is the legal use of the words malice. In a narrow and popular sense this term means ill-will, spite, or malevolence, but its legal significant is much wider, Malice means in law wrongful intention or recklessness. Any act done with one of these mental elements is, in the language of the law, malicious, and this legal usage has etymology in its favour. The Latin *malitia* means badness physical or moral -- wickedness in disposition or in conduct --- not specifically or exclusively ill will or malevolence; hence the malice of English law, including all forms of evil purpose, design, intent or motive.

We have seen, however, that we must distinguish between the immediate intention with which an act is done and its ulterior purpose or motive. The term malice is applied in law to both these, and the result is a somewhat puzzling ambiguity which requires careful notice. When we say that an act is done maliciously, we mean one or two distinct things. We mean either that it is done intentionally (or alternatively recklessly) or that it is done with some wrongful motive. In the phrases malicious homicide and malicious injury to property malicious is only a collective term for intention and recklessness. I burn down a house maliciously if I burn it on purpose or realising the possibility that what I do will set it on fire. There is here no reference to any ulterior purpose or motive. But on the other hand malicious prosecution does not mean any intentional prosecution, it means more narrowly, a prosecution inspired by some motive of which the law disapproves. A prosecution is malicious, for example, in its ulterior intent is the extortion of money from the accused. So, also, with the malice which is needed to make a man liable for defamation on a privileged occasion; I do not utter defamatory statements maliciously simply because I utter them intentionally.

Although the word *militia* is not unknown to the Roman lawyers, the usual and technical name for wrongful intent is *dolus*, or more specifically *dolus malus*, *Dolus* and *culpa* are the two forms of *mens rea*. In a narrow sense, however, *dolus* includes merely that particular variety of wrongful intent which we term fraud--that is to say, the intent to deceive. From this limited sense it was extended to cover all forms of wilful wrong doing. The English term fraud has never received an equally wide extension. It resembles *dolus*, however, in having a double use. In its narrow sense it means deceit, as we have just said, and is commonly opposed to force. In a wider sense it includes all forms of dishonesty, that is to say, all wrongful conduct impired by a desire derived profit from the injury of others. In this sense fraud is commonly opposed to malice in its popular sense. I act fraudulently when the motive of my wrong doing is to derive some material gain for myself, whether by way of deception, force or otherwise. But I act maliciously when my motive is the pleasure of doing harm to another rather than the acquisition of any material advantage for myself. To steal property is fraudulent ; to damage or destroy it is malicious.

Q. 19. Is motive to commit crime always relevant in proving of an offence?

Ans. A wrongful act is seldom intended and desired for its own sake. The wrong doer has in view ulterior object which he desires to obtain by means of it. The evil which he does to another, he does and desires only for the sake of some resulting good which he will obtain for himself.

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A person's ulterior intent may be complex instead of simple ; he may act from two or more concurrent motives instead of from one only. He may institute a prosecution, partly from a desire to see justice done, but partly also from ill-will towards the defendant. He may pay one of his creditors preferentially on the eve of bankruptcy, partly from a desire to benefit him at the expense of the others, and partly from a desire to gain some financial advantage for himself. Now the law, as we shall see later, sometimes makes liability for an act depend upon the motive with which it is done. The Bankruptcy Act for example, regards as fraudulent any payment made by a debtor immediately before his bankruptcy with intent to prefer one of his creditors to the others. In all such cases the presence of mixed or concurrent motives raises a difficulty of interpretation.

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- (4) that it must be a determining intent that is to say an intent is the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case.

Q. 20. Explain giving Illustrations the difference between Motive and Intention?

Ans. DIFFERENCE BETWEEN MOTIVE AND INTENTION : A distinction exists and must be made between a man's motive and intention. The law takes into account only a man's intention and not his motive. Motive is directed to the ultimate end, good or bad, which a person hopes to secure; his intention is concerned with the immediate effects of his acts. In judging a man's criminality, regard must be had to his primary and immediate intention and not to his secondary or remote intention, if intention it may be called for in reality it is the motive which the law ignores. A person may act from a laudable motive, but if he intentionally causes wrongful loss, his crime is complete irrespective of his motive.

Several Hindus, acting in concert, forcibly removed an ox and two cows from the possession of a Muslim, not for the purpose of causing 'wrongful gain' to themselves or 'wrongful loss' to the owner of the cattle, but for the purpose of preventing the killing of the cows. It was held that they were guilty of rioting however, laudable their motive might be.

Where, for instance, a Hindu acting under a strong religious impulse seized some cows which a Muslim was taking to kill, his motive from the stand-point of a person of his own religion was virtuous, but his intention being to deprive the lawful owner of the possession of his property, and the means employed being unlawful, he was held guilty of theft.

Illustration : Where the creditors of A complained of their debts to B, the master of A, and B, without referring to the Civil Court, took the law into his hands and taking three cows of A without his consent handed them over to his creditors to satisfy their claims, B was held to have done it "dishonestly".

Q. 21. Discuss "Mens rea" and 'Actus Rea' as essentials of a crime?

Ans MENS REA AND ACTUS REA : A criminal offence generally consists of two elements i.e. the mental and physical. The requisite physical and mental elements are expressed by the term *Mens rea* and *Actus Rea* respectively. Both the components are necessary for the commission of crime, it is said that no crime is committed unless there is a concurrence of guilty act and guilty mind. The common law maxim: "*actus facit reum nisi mens sit rea*" conveys the same message.

After general discussions two essential components of crime are being explained separately.

1. MENS REA : A fundamental principles of criminal law is that a mere act does not constitute a crime. It requires a guilty mind or *mens rea* behind it. As a man is responsible not for his acts in themselves but for his 'acts' which are accompanied by *mens rea*. There must be an intention to do some act before a person can be held guilty of crime. In the words of Lord Kenyon "the intent and act must both occur to constitute a crime. Thus *mens rea* in the case of a murder means malice afterthought, in case of theft an intention to steal and in case of receiving stolen goods knowledge, that the goods were stolen.

Satisfaction of two things.

Before punishing a person, therefore, the law must be satisfied of two things.

- (a) that the act has done with consequent harmful result, and
- (b) that the mental attitude of the doer towards the deed was such as to render punishment effective as a deterrent for the future.

The guilty mind may take the form of either wrongful intention or capable negligence. That is to say the person may have done the act consciously or he may not have taken such care as it was his duty to taken. In either of these cases he is liable for the injury caused.

Kinds : A *mens rea* must consist of either

- (1) intention (2) or negligence.

Mens rea must extend to following three parts of an Act:

- (1) The physical doing or not doing.
- (2) The circumstances, and
- (3) The consequences.

If *mens rea* does not extend to any part of the act, there should be no guilty mind behind it and question of punishment does not arise.

The doctrine of *mens rea* has been applied by Courts in Pakistan and it is now firmly settled law that *mens rea* is an essential ingredient of offence.

Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of object of the statute would be defeated.

The element of *mens rea* is not required beyond the point that the facts must show an intention on the part of the person accused to the act forbidden.

In the case of modern statutory offences the maxim has no general exceptions and the statutes are to be regarded as themselves prescribing the mental element which is pre-requisite to a conviction.

So *mens rea* is an essential element of crime in every penal statute unless the same either expressly or by necessary implication is ruled out by the statute.

(2) ACTUS REA.

The word "*actus*" denotes a deed, a physical result of human conduct and "*actus reus*" has been defined as, "Such result of human conduct as the law seeks to prevent".

The physical outcome of some act is ultimate result of it and not the intervening conduct which results in the enactment of the result.

Explanation : In the case of murder the victim's death is ultimate outcome of the physical result of the conduct of the accused and is the *actus reus* and murderer's intention to kill his victim is the guilty intent or *mens rea*, or in other words, the cause for the effect, that is, the victim's death.

Actus rea is an essential ingredient of crime and is constituted by the event not by the activity which caused the event. A deed may consist of harm and destruction of property and even of life, but it is not a crime unless the circumstances are such that it is legally prohibited.

Actus reus includes an act as well as an omission. But the legal duty, the omission to perform which is punishable under criminal law shall only be so punishable when the offender did owe some duty to the person adversely affected. Such would be the case of a grown up person choose to undertake the charge of a human creature helpless either from infancy, simplicity lunacy or any other infirmity.

In such a case the person who undertakes the charge is bound to execute it faithfully and if he fails to do with, he will be criminally liable.

Intervention of another person

In cases where there is intervention of another and the action of that person is the direct and immediate cause of the harm, the original wrong-doer will be absolved of liability on the basis that harm that ensued was in consequence of what the intervener did. But in such a case there must be a clear proof that the act of the first man had no bearing. Otherwise, both may be liable.

Where there is physical participation or participation is indirect : *Actus reus* is fully attributable even to a man who takes no active part in the actual commission of crime *e.g.* where he has effected his criminal aim through an innocent agent, such as a little child or a lunatic. So also, where his participation is only indirect, *e.g.*, where he secretly puts poison into a drink which he knows A will offer to B or where he recklessly leaves machinery in a position that, as he realizes that may cause harm to a person through being moved inadvertently by some one else.

In *R.v. Hilton*, the prisoner who was in charge of a steam engine, had stopped the engine and had gone away. During his absence some unauthorised person has set the engine in motion and it killed the deceased.

Held: that the person was not guilty as the death was the consequence, not of the act of the prisoner but of the person who set the engine in motion.

Kenny is of the view the sounder reason for the acquittal would have been that the prisoner did not expect that any harm would result from his breach of duty.

If a dangerous wound is inflicted and death results, the person who inflicted the wound is criminally responsible for the death although the person wounded, neglected to use proper remedies.

EXAMPLE : Where the wounds turn to a gangrene or fever for want of proper application and the man dies of gangrene or fever.

Same would be the case where the person injured refuses to submit to a necessary operation or where he dies after such an operation which was carefully and properly performed.

(*Actus Reus*-Source: General Principles of Criminal Law by M.M. Iqbal.

CONCLUSION : After an exhaustive discussion, it may be said that *Mens rea* and *Actus Reus* are the essential components of crime. As there can be committed no crime unless there is a concurrence of guilty mind (*Mens rea*) and guilty act. (*Actus reus*).

M. YUSUF M. BALUCH

